(4)

No. 01-1134

Supreme Court U.S.
FILED
APR 8 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as COMMISSIONERS OF THE INDIANA UTILITY REGULATORY COMMISSION,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MIDWESTERN GAS TRANSMISSION COMPANY

JANET K. PLACE
General Counsel
NORTHERN PLAINS NATURAL GAS COMPANY
1111 South 103rd Street
Omaha, Nebraska 68124-1000
(402) 398-7886

G. DANIEL KELLEY, JR.
Counsel of Record
WILLIAM P. DIENER
EDWARD P. STEEGMANN
ICE MILLER
One American Square
Box 82001
Indianapolis, Indiana 46282
(317) 236-2100

Attorneys for Respondent Midwestern Gas Transmission Company

173289

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

10998

CORPORATE DISCLOSURE STATEMENT

Midwestern Gas Transmission Company ("Midwestern") is a wholly owned subsidiary of Border Midwestern Company. Border Midwestern Company is a wholly owned subsidiary of Northern Border Intermediate Limited Partnership. Northern Border Intermediate Limited Partnership is owned by three general partners, two of which are wholly owned subsidiaries of Enron Corporation and one of which is a wholly owned subsidiary of The Williams Companies, Inc. The Williams Companies, Inc. is a publicly held company. Northern Border Intermediate Limited Partnership also has one limited partner, Northern Border Partners LP, a publicly held company.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	xi
No Question Presented — Dismissal Required	1
Statement of the Case	3
Deregulated National Market And Open Access Interstate Transportation	4
FERC Proceedings	8
FERC's Unappealed Decision	9
The IURC (Petitioners) Defers Preemption Issue To Federal Forums	9
SIGECO Pursues More Litigation	10
The District Court	10
The Seventh Circuit's Decision	10
Corrections Pursuant To S. Ct. Rule 15.2	12
Reasons for Denying the Petition	14
Question 1 — Presents Nothing But Petitioners' Concoctions	14

Contents

	Page
Question 2 Presents Nothing	18
Question 3 Presents Nothing — SIGECO's Harassing, Vexatious Litigation	19
Seventh Circuit Correctly Determined FERC's Exclusive Jurisdiction Over Transportation Of User Purchased Gas In One State To User's Facility In Another State.	21
Conclusion	29

TABLE OF CITED AUTHORITIES

Page

Cases:

American Gas Association v. FERC, 587 F.2d 1089 (D.C. Cir. 1978) 7, 23

Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) 7, 23

Baggett v. Department of Professional Regulation, Board of Pilot Commissions, 717 F.2d 521 (11th Cir. 1993) 15

Norfolk & W.Ry. v. Public Utils. Comm'n, 926 F.2d 567 (6th Cir. 1991) 15

Bud Antle Inc. v. Barbosa, 45 F.3d 1261 (9th Cir. 1995), *cert. denied*, 516 U.S. 1159 (1995) 15

Bunning v. Commonwealth of Kentucky, 42 F.3d 1008 (6th Cir. 1994) 15

Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412 (10th Cir. 1992) 23, 25

Chaulk Services Inc. v. Massachusetts Comm'n Against Discrimination, 70 F.3d 1361 (1st Cir. 1995) 15

Communications Telesystems Int'l v. California Pub. Util. Comm'n, 196 F.3d 1011 (9th Cir. 1999) ... 16

Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464 (1950) 25

Cited Authorities

Page

Federal Power Commission v. Louisiana Power & Light Co., et al., 406 U.S. 621 (1972) 24, 25

FPC v. Transcontinental Gas Pipeline Corp., 365 U.S. 1 (1961) 4, 23

Freehold Co.-Generation Associates v. Board of Regulatory Commissions, 44 F.3d 1178 (3d Cir. 1995), *cert. denied*, 516 U.S. 815 (1995) 15

Gartrell Construction Inc. v. Aubrey, 940 F.2d 437 (9th Cir. 1991) 15

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) 22

In re Indiana Gas Company, Inc., 122 PUR. 4th 365, 1991 WL 501832 (Ind. URC, 1991) 13, 22

In Re Southern Indiana Gas & Electric Company, 2000 WL 33181398 (Ind. URC 2000) 14

Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947) 26

Michigan Consol. Gas Co. v. Panhandle Eastern Pipeline Co., 887 F.2d 1295 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990) 22

Michigan Consolidated Gas Company v. FERC, 883 F.2d 117 (D.C. 1989), *cert. denied*, 494 U.S. 1079 (1990) 22, 23, 25

Cited Authorities

Page

Middlesex County Ethics Committee, etc. v. Garden State Bar Association, 457 U.S. 423 (1982) 20

National Fuel Gas Supply Corporation v. Public Service Commission of New York, 894 F.2d 571 (2d Cir. 1990), *cert. denied*, 497 U.S. 1004, 1105 S. Ct. 3240 (1990) 23

National Railroad Passenger Corp. v. State of Florida, 929 F.2d 1532 (11th Cir. 1991) 15

New Orleans Public Service Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 1

New York, et al. v. FERC, et al., __ U.S. __, 122 S. Ct. 1012 (2002) 2, 24, 25

Norfolk & Western Ry. v. Public Utilities Comm'n of Ohio, 926 F.2d 567 (6th Cir. 1991) 15

Northwest Central Pipeline Co. v. State Corporation Comm'n, 489 U.S. 493 (1989) 11, 16

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 97 S. Ct. 1898 (1977) 20

Oklahoma Natural Gas Co. v. Federal Energy Regulatory Commission, 906 F.2d 708 (D.C. Cir. 1990) 25

Panhandle-Eastern Pipeline Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) 5, 13, 22

Cited Authorities

Page

Panhandle-Eastern Pipeline Co. v. Public Service Comm'n of Ind., 332 U.S. 507 (1947) 5, 13, 22

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 6, 26

Public Utility Commission of California v. FERC, 900 F.2d 269 (D.C. Cir. 1990) 23, 25, 26

Public Service Commission of the State of N.Y. v. Mid-Louisiana Gas Company, et al., 463 U.S. 319 (1983) 6

Ramsden v. Agribank, 214 F.3d 865 (7th Cir. 2000) 21

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 11, 16

Solid Waste Agency of Northern Cook County v. United States Army Corp., __ U.S. __, 121 S. Ct. 675 (2001) 28

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 8

Town of Lockport v. Citizens for Community Action at Local Level Inc., 430 U.S. 259 (1977) 12

Transcontinental Gas Pipeline Corporation v. State Oil & Gas Board of Mississippi, 474 U.S. 409 (1986) 5, 6

Cited Authorities

Page

United Distribution Company v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), *cert. den. sub nom American Public Gas Ass'n v. FERC*, 520 U.S. 1224 (1997) 5, 6, 23, 26

United Pipeline Company v. Federal Power Commission, et al., 385 U.S. 83 (1966) 24

Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943) 1, 15, 18

Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255 (10th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990) 21

Statutes:

15 U.S.C. § 717(b) ..... *passim*

15 U.S.C. § 717a(7) 22

15 U.S.C. § 717f(c) 4

15 U.S.C. § 717f(c)(2) 7, 27

15 U.S.C. § 717r(b) 9, 20

15 U.S.C. § 3301 *et seq.* 2

15 U.S.C. § 3301(17) 27

15 U.S.C. § 3301(21) 6

Cited Authorities

	Page
15 U.S.C. § 3394(a)	27
15 U.S.C. § 3431	2, 22
15 U.S.C. § 3431(a)(1)(A)	6
15 U.S.C. § 3431(b)(1)(A)	6
15 U.S.C. § 3431(b)(1)(C)	6
16 U.S.C. § 824(b)	24
16 U.S.C. § 824(b)(1)	2
28 U.S.C. § 2283	20
Ind. Code 8-1-1.1-4.1	8
Ind. Code 8-1-2-87	8, 9, 10
Ind. Code 8-1-2-87.5	9, 10
Ind. Code 8-1-2-87.5(b)	9
P.L. 102-486, Sec. 202	28
Pub. L. 95-621	2
Pub. L. 101-60	2
Rules:	
S. Ct. Rule 14.1(a)	1, 14
S. Ct. Rule 15.2.18	12

Cited Authorities

Page

Other Authorities:

CCH Utility Law Reports, ¶ 5802 7

18 C.F.R. § 157.205(i)(1) 9

18 C.F.R. § 284 4

18 C.F.R. § 284.8 4

18 C.F.R. § 284.9 4

House Conference Report No. 101-100, U.S. Code, Cong. & Admin. News (USCCAN), Vol. 2 (1989) 7

House Rept. No. 102-474(I) re proposed Sec. 204, "Rules in Local Distribution Bypass Cases." 1992 USCCAN 1953 (102nd Cong., 2d Sess., 1992) ... 28

TABLE OF APPENDICES

Page

Appendix A — Additional Statutory Provisions ... 1a

Appendix B — Opinions, Orders And Notices Of The Federal Energy Regulatory Commission Issued December 16, 1998 ..... 8a

Appendix C — Order On Motion To Dismiss Of The State Of Indiana, Indiana Utility Regulatory Commission Dated January 27, 1999 ..... 41a

Appendix D — Request Of The Midwestern Gas Transmission Company For Blanket Authority .. 60a

Appendix E — Affidavit Of Mike A. Stokdyk Dated April 26, 2000 ..... 65a

NO QUESTION PRESENTED — DISMISSAL REQUIRED

The "questions" asserted by Petitioners are based on misquotes and misconstructions of the Seventh Circuit's decision, and present nothing. Petitioners "questions" are far worse than being argumentative, contrary to S. Ct. Rule 14.1(a) — the Petition should be summarily dismissed.

The Seventh Circuit in regard to *Younger* abstention, adopted the unanimous view of the First, Sixth, Ninth and Eleventh Circuits, n.20, *infra*, that this Court does not require *Younger* abstention where State proceedings are "on their face plainly invalid", *Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 468-69 (1943), or "perhaps" where federal preemption is "facially conclusive", *New Orleans Public Service Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 367 (1989) (*NOPSI*). A State has no valid interest in pursuing patently or facially invalid actions or proceedings. *See infra*, pp. 15-18.

A fair reading of the Seventh Circuit's determination of facially clear preemption **is not** as concocted and misquoted by Petitioners that such was based on "its preliminary view that the State law 'seems' to be preempted . . . ". Pet. (i), or a "quick look at the merits", or "lowered the bar to 'seems' preempted," or created a "lax 'seems' preemption standard" (Pet. 11, 14, 19). To the contrary, the Seventh Circuit adopted an unbroken line of cases ("It seems to us, as it has seemed to the other courts to have addressed the issue"), including multiple cases from three circuits, n.26, *infra*, as well as an uncontested jurisdictional decision of this Court, that the unbundled transportation of user purchased gas in one State to the user's facility in another State "via Midwestern's pipeline is the transportation of natural gas in interstate commerce", for which the exclusive regulatory jurisdiction is given to FERC pursuant

to Section 1(b) of the Natural Gas Act (NGA, "§ 1(b)"), 15 U.S.C. § 717(b).[1] M.App. 4a.

That transportation of user purchased natural gas out-of-state into the user's in-state facility is within § 1(b)'s unambiguous grant of jurisdiction to FERC over "transportation of natural gas in interstate commerce", every circuit has found to be clear, beyond any doubt. Preemption could not be more facially conclusive, clear or readily apparent, as found by the Seventh circuit. *See* pp. 21-28.

These circuits' decisions were affirmed by this Court's recent decision, *New York, et al. v. FERC, et al.*, __ U.S. __, 122 S. Ct. 1012, 1022-23 (2002), under language in § 2(b)[2] of the Federal Power Act strikingly similar to § 1(b) of the NGA (where like under the NGA, FERC has jurisdiction over wholesale sales, but not retail sales, and over transmissions in

1. Section 1(b) has been limited by the Natural Gas Policy Act of 1978, Pub.L. 95-621, 15 U.S.C. § 3301 *et seq.* ("NGPA") and the Natural Gas Wellhead Decontrol Act of 1989, Pub.L.101-60, amending certain provisions of 15 U.S.C. § 3301 *et seq.* ("NGWDA") in "Subchapter VI, Coordination With Natural Gas Act" which limits § 1(b) and other provisions of the NGA from applying to "first sales". 15 U.S.C. § 3431. Section 1(b) and other relevant statutory texts are reproduced in Midwestern's Appendix hereto(M.App.) at 1a. Petitioners are "P.App."

2. Section 2(b), 16 U.S.C. § 824(b)(1) states in part:

> The provisions of this subchapter shall apply to the **transmission of electric energy** [like transportation in § 1(b)] **in interstate commerce** and to **the sale of electric energy at wholesale** [like wholesale gas § 1(b)] . . . but . . . **shall not apply** [like the NGA's proviso] to any other sale of electric energy . . . the Commission . . . **shall not have jurisdiction,** . . . over facilities used for the generation of electric energy or over facilities used in **local distribution** or only for the transmission of electric energy in intrastate commerce. . . .

(Emphasis added.)

interstate commerce, with a similar proviso regarding local distribution) that *unbundled retail transmission* is subject to FERC's jurisdiction over "transmission of electric energy in interstate commerce" which this Court found to be clear and unambiguous. Preemption as found by the Seventh Circuit could not be more facially conclusive, clear or readily apparent. *See infra*, pp. 21-28.

The Seventh Circuit did not create any exception to *Younger* based on the FERC case being first filed — Petitioners' misconstruction at the base of Question 3. To the contrary, in addition to finding *Younger* inapplicable because of the facially clear preemption, the Seventh Circuit found *Younger* inapplicable based on SIGECO's "vexatious", "harassing" litigation, "aimed at undoing the results of federal regulatory proceedings," (P.App. 8a) a proceeding where SIGECO and Indiana appeared, in which FERC decided the very issues raised by SIGECO's subsequent, but voluntarily stayed, Petition before the IURC (petitioners herein ordered a stay "deferring the federal preemption issue for resolution by federal forums"), which FERC decision neither SIGECO nor the Indiana agency appealed, and SIGECO filed several more IURC petitions and a State Court action, all "aimed at undoing" the FERC decision and certifications of the transportation for GPC and Scepter. *See infra*, pp. 21-28.

STATEMENT OF THE CASE

The unregulated third party natural gas sales out-State to the industrial users, GPC and Scepter, and the unbundled transportation by Midwestern of the user-purchased natural gas in interstate commerce into the users' in-State facilities — giving rise to SIGECO's forum shopping and vexatious litigation before FERC, the IURC and an Indiana Circuit Court — were the result of the congressional mandates from 1978 to 1989 in the NGPA and NGWDA creating a competitive integrated national natural gas market and the congressionally encouraged FERC

requirements (Orders 436 and 636[3]) for unbundled, open access interstate pipeline transportation. Federal law requires Midwestern to provide unbundled interstate transportation service to customers, like GPC and Scepter, on a non-discriminatory basis. 18 C.F.R. §§ 284.8 and 284.9.

The unambiguous language of NGA § 1(b) leaves no doubt that ever since 1938, the last foot of unbundled transportation of user-purchased out-State gas into the user's in-State facility is transportation in interstate commerce subject to FERC's exclusive jurisdiction. Further, the history of deregulation, unbundling and open access, demonstrates that such is now more than ever necessary to effectuate the Congressional mandates, *infra*, pp. 4-8. Indeed, several amendments set forth again and again that such last foot of the interstate journey into the user's facility is within FERC's exclusive jurisdiction over the transportation of natural gas in interstate commerce, *infra*, pp. 26-28. Indiana's legislative attempt to assume regulatory jurisdiction over such are patently, clearly, facially invalid as preempted, *infra*, pp. 14-18.

Deregulated National Market And Open Access Interstate Transportation. While unbundled interstate pipeline transportation of user-purchased natural gas from out-of-State to users' facilities in-State has been occurring for more than 40-50 years, historically it was uncommon and not encouraged — despite this Court's affirmance that FERC's jurisdiction over "transportation in interstate commerce" encompasses unbundled transportation of user owned gas into the user's plants "as § 7 require[s] the Commission to certificate the transportation of gas pursuant to the sale." *See FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 3 (1961) affirming FPC's denial of a Section 7 certificate (15 U.S.C. § 717f(c)) for unbundled transportation of user-owned gas based

3. Order 656, 57 FR. 13267-02 (1992), and Order No. 436, 50 FR 424085-01 (October 18, 1985) amending and adding various parts of 18 C.F.R. 284.

on non-jurisdictional considerations "including" the unpreferred use of gas to displace coal to produce electricity and the concern for the effect of unregulated prices on wholesale prices.

The 1938 NGA[4] gave FERC independent grants of jurisdiction over (i) wholesale sales of natural gas and (ii) over the transportation of natural gas in interstate commerce.[5] Under NGA's regulatory structure, the interstate pipelines purchased the gas from the producers, selling a bundled product (transportation and gas) to the local distribution companies (LDC's) throughout the country, and then LDC's distributed the gas to consumers. However, the structure had unintended consequences on the supply side. In the interstate wholesale market regulated by FERC, the prices for natural gas from producers were set at a rate below the price in the second unregulated intrastate market. This resulted in two different markets for natural gas with gas being withheld from the national market and national shortages but excess supply in certain intrastate areas.[6]

Beginning in 1978 with the NGPA and concluding in the 1989 NGWDA, Congress created an integrated, competitive

4. With respect to the history leading to the NGA, *see United Distribution Company v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996) *cert. den. sub nom American Public Gas Ass'n v. FERC*, 520 U.S. 1224 (1997).

5. States, not FERC, have jurisdiction over in-State bundled sales of natural gas to industrial users by interstate pipelines, as FERC has only wholesale sales jurisdiction. *Panhandle-Eastern Pipeline Co. v. Public Service Comm'n of Ind.*, 332 U.S. 507, 516-22 (1947) and *Panhandle-Eastern Pipeline Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951). Today, the States' jurisdiction with respect to first-sale gas is questionable. *See Transcontinental Pipeline Corporation v. State Oil & Gas Board of Mississippi*, 374 U.S. 409, 422 (1986), *infra*, p. 6.

6. *See* the history set forth in *Transcontinental Gas Pipeline Corporation v. State Oil and Gas Board of Mississippi*, 474 U.S. 409, 422 (1986).

national natural gas market by deregulating essentially "any sale" of natural gas to anyone, specifically including "***to any person for use by such person***" (*except a sale by* a pipeline or an LDC), whether for resale, consumption, interstate or intrastate, *i.e.*, the purchased gas by GPC and Scepter.[7] The deregulation of such "first sales" encompassed not only price, but market entry and exit.[8] Some States saw the deregulation as an opportunity for State regulation, but this Court quickly disagreed, holding that the answer "whether Congress in revising a comprehensive Federal regulatory scheme to give market forces a more significant role in determining the supply, demand and the price of natural gas, intended to give the States the power it had denied FERC, . . . must be in the negative." *Transcontinental Gas Pipeline Corporation v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 422 (1986).

At the outset of the deregulation effort, it became apparent that a national market could not develop in the face of interstate pipelines being able to refuse transportation services to others to protect pipeline sales to third parties. The market function was indeed subject to market power — monopoly power.[9] Open access and unbundling were required. In a series of orders, mainly Order 436 in 1985, FERC then attempted to

---

7. *See* 15 U.S.C. § 3301(21), and *Public Service Commission of the State of N.Y. v. Mid- Louisiana Gas Company, et al.*, 463 U.S. 319, 324 (1983) (the definition of "first sale" meant that "there may be many first sales of a single volume of gas between the well and the pipeline's customers").

8. 15 U.S.C. § 3431(a)(1)(A), (b)(1)(A) and (C) essentially deleted a "regulatory milestone" from the NGA (*Phillips Petroleum*, *infra*) and provided that jurisdiction under § 1(b) of the NGA shall not apply to a first sale, that any amount paid for a first sale "shall be deemed just and reasonable" for purposes of §§ 4 and 5 of the NGA and that a certificate cannot be denied or conditioned under § 7 of the NGA because of a first sale price. (M.App. 4a). *See also* 50 FR 42408, 42418 (Oct. 18, 1985).

9. *United Distribution Company v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996), *cert. den. sub nom*, *American Public Gas Ass'n v. FERC*, 520 U.S. 1224 (1997).

prompt the interstate pipelines to unbundle and to give open access transportation service to industrial users, LDC's and any other first-sale buyer. Congress had specifically sought to encourage direct purchases by users, effectively authorizing the Commission to discriminate by issuing certificates of public convenience and necessity "for the transportation in interstate commerce of natural gas used [and owned] by any person for one or more high priority uses."[10]

With enactment of the 1989 NGWDA, Congress sought an unregulated, integrated national gas market in which "**[a]ll sellers must be able to reasonably reach the highest bidding buyer in an increasingly national market. All buyers must be free to reach the lowest selling producer, and obtain shipment of its gas to them on even terms with other suppliers.**"[11] The Joint Committee stressed the necessity for open transportation markets and that FERC must continue to insure "open access" by regulation of the pipelines' monopoly power. In response to these Congressional urgings, in 1992 FERC went from mere incentives under Order 436 to mandatory unbundling and open access under Order No. 636.[12]

---

10. 15 U.S.C. § 717f(c)(2). (M.App. 2a-3a). Before this amendment to Section 7, FERC issued Order No. 533 permitting unbundled interstate transportation of natural gas purchased by high priority users from producers which the D.C. Circuit affirmed as "a legitimate, experimental approach for dealing with the apparently skewed nature of our half-free market". *American Gas Association v. FERC*, 587 F.2d 1089, 1097 (D.C. Cir. 1978). *See also Associated Gas Distributors v. FERC*, 824 F.2d 981, 1042 n. 41 (D.C. Cir. 1987), where the D.C. Circuit rejected an argument that this amendment to Section 7(c) of the NGA, § 717f(c)(2), creates an inference that FERC's jurisdiction over transportation of user owned gas in interstate commerce does not extend to transportation into an end-user's facility).

11. House Conference Report No. 101-100, 101-29, U.S. Code, Cong. & Admin. News (USCCAN), Vol. 2 (1989), pp. 51, 53, 56.

12. "The Commission believes that to accomplish [Congress'] objectives, **it is vital to give all gas purchasers (LDC's and end-users,**

(Cont'd)

Today, downstream marketers and market centers exist along with secondary interstate transportation markets for resold pipeline capacity.[13] The Congressional efforts at a competitive national natural gas market served through non-discriminatory open access interstate transportation allow all buyers to reach the lowest cost producers and all sellers to reach the highest bidding buyers. This has resulted in the vast majority of industrial, electric generators and commercial end users *and the LDC's bypassing* the pipelines and buying gas from parties other than pipelines[14] — in other words, reach a competitive national market for gas and purchase mandatory non-discriminatory unbundled interstate transportation (in both a primary and secondary market) back into the purchaser's facility.

FERC Proceedings. On May 12, 1998, Midwestern filed a request with the FERC seeking authorization to construct and operate facilities to be used to transport natural gas to GPC. M.App. 8a. **SIGECO and the Indiana Office of Utility Consumer Counselor, an agency of the State of Indiana, intervened.** (M.App. 11a) That the IURC did not appear makes no difference.[15] SIGECO filed a protest contending that Midwestern's interstate transportation service to GPC would violate Indiana law, Ind. Code 8-1-2-87 ("Section 87") and/or

(Cont'd)
such as industrials and gas-fired electric generators) the ability to make market driven choices about the price of gas as a commodity and about the cost of delivering the gas". [57 FR 13267, 13269, emphasis added].

13. *See* FERC Order No. 637, 65 FR. 10156 (Feb. 9, 2000); CCH Utility Law Reports, ¶ 5802.

14. *Id.*, pp. 6325-6326.

15. The Office of Consumer Counselor is an "agency" and represents "ratepayers, consumers and the public in . . . in all other proceedings including proceedings before federal agencies. . . ." Ind. Code 8-1-1.1-4.1. Public officials of a government are in privity with their government as to official acts and successive litigation. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940).

Ind. Code 8-1-2-87.5 ("Section 87.5"), M.App. 12a-13a, which purport to require a certificate for any entity that "is engaged in the transportation of gas from outside Indiana for its direct sale or delivery to any end-user consumer or consumers within this State. . . ." Section 87.5(b). M.App. 6a-7a. SIGECO also objected based on asserted stranded costs, environmental problems, that GPC had not negotiated in good faith with SIGECO and for a myriad of other reasons. M.App. B, *passim*.

FERC's Unappealed Decision. On December 16, 1998, the FERC issued its order authorizing Midwestern's construction and operation of facilities for provision of interstate transportation service to GPC. M. App. B. The FERC specifically rejected SIGECO's contentions and held based on indistinguishable decisions by three Federal Circuits that the NGA preempts § 87 and/or § 87.5, the Indiana statutes pursuant to which SIGECO claimed that the IURC had jurisdiction over the Midwestern-GPC transaction. M. App.15a-19a. Neither SIGECO, nor the State appealed under 15 U.S.C. § 717r(b), the exclusive avenue for challenging FERC's decisions.[16]

The IURC (Petitioners) Defers Preemption Issue To Federal Forums. On June 11, 1998, SIGECO filed a petition before the IURC for a cease and desist order against Midwestern providing transportation for GPC because of non-compliance with Sections 87 and 87.5. M.App. 41a *et seq.* Petitioners misstate that: "On June 11, 1998, the IURC began a proceeding targeting Midwestern's . . . ." Pet. 4. On January 27, 1999, the IURC, acknowledging "that the weight of federal decisions would suggest that the application of the Indiana statutes to the instant petition would not survive a federal challenge, **stayed SIGECO's proceeding (which stay remains to this**

16. On October 13, 1999, Midwestern filed an application with the FERC for the Scepter interstate transportation service of natural gas to be purchased by Scepter in the unregulated national market. M.App. 60a-64a. After notice (64 F.R. 57,635 (1999)), and after no protest was filed, Midwestern automatically received FERC approval. 18 C.F.R. § 157.205(i)(1).

day) "while the federal preemption question progresses through federal channels. . . . We are in effect deferring the federal preemption issue for resolution by federal forums." M.App. 57a. Petitioners misstate that the stay was only pending the FERC proceedings. Pet. 4.

SIGECO Pursues More Litigation. After the stay, on April 14, 1999 SIGECO filed an action in State court seeking to stop Midwestern's construction of the GPC lateral under a roadway, which proceeding the State court stayed (Cir.'s App. 105, 119), and filed in January 2000 two more petitions before the IURC based on Sections 87 and 87.5.

The District Court. In April, 2000, Midwestern filed this action seeking to enjoin SIGECO and Petitioners from proceeding under the Indiana statutes which purport to require certification to transport user-purchased gas out-of-State to the user's Indiana facilities as such were preempted by § 1(b) of the NGA. The District Court granted motions to dismiss, holding that it was compelled to abstain under *Younger* in deference to SIGECO's IURC proceedings.

The Seventh Circuit's Decision. The Seventh Circuit recognized that *Younger* abstention is not required if the State proceeding and statute are facially invalid:

> If the State does not have such an interest, if for example, it is seeking to regulate activities that clearly are under exclusive federal control, there is no basis for invoking *Younger*. *See Chaulk Services Inc. v. Massachusetts Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995), and cases cited there; *Norfolk & Western Ry. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991). (P.App. 6a.)

The Seventh Circuit determined that when the NGA grants FERC jurisdiction, "such is exclusive and preempts State

regulation," citing *Northwest Central Pipeline Co. v. State Corporation Comm'n*, 489 U.S. 493, 506-07 (1989) and *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). Then, in light of the three circuits which previously decided the precise issue before it, n.26, *infra*, the Court held:

> **It seems to us, as it has seemed to the other courts to have addressed the issue** [citations omitted to the Tenth, the D.C. and the Sixth Circuits] that the transportation of natural gas bought and produced out-of-State to Indiana residents via Midwestern's pipeline is interstate transportation. . . . (P.App. 4a).

Hence, the Court determined that Indiana had no valid interest in requiring IURC permission to transport gas from out-of-State to the Indiana purchasers: "Mere defiance of clear federal law removing an area from potential state regulation is not [a valid State] interest." P.App. 7a.

This was not, as petitioners misstate, that the Seventh Circuit simply held that "it 'seems' to be preempted" or that it created "a lax 'seems' preempted standard" Pet. 9, or that the Court simply said "it 'seems' to us, these circuits were correct." Pet. 14. All the matters which Petitioners castigate the Seventh Circuit for not discussing were fully discussed in the decisions of the Sixth, Tenth and District Court of Columbia Circuits adopted by the Seventh Circuit.

The Seventh Circuit did not hold that once a FERC petition is filed, subsequent State proceedings can be enjoined, as Petitioners assert in Question 3. Rather, the Seventh Circuit found *Younger* inapplicable for an additional reason — "harassing," "vexatious litigation" by SIGECO "aimed at undoing the results of [a FERC] proceeding," (P.App. 6a, 8a.) because the FERC action was first filed, first decided, and unappealed — an action in which Indiana and SIGECO appeared and decided all the issues which SIGECO later sought to present to the petitioners here. The IURC proceedings remained at an

early stage (indeed, had been stayed by the petitioners here "deferring the federal preemption issue for resolution by the federal forums"). M.App. 57a. Based on these facts, the Seventh Circuit held that the *Younger* policy "has no applicability to a case such as this, in which . . . a federal proceeding (here before the Federal Energy Regulatory Commission) . . . reaches completion while the state proceeding is still pending at an early stage. . . ."[17]

The Seventh Circuit reasoned that:

> we cannot see how the *Younger* doctrine is impaired by forcing a disputant to make his arguments in the first authorized forum to become seised of his dispute. . . . There is a peculiar perversity in SIGECO's invocation of the Younger doctrine. . . . SIGECO is arguing for using the doctrine to split the proceedings between the federal and state agencies. The injunction sought by Midwestern merely seeks to prevent **vexatious litigation** by a disappointed party, namely SIGECO, in the Federal regulatory proceedings. [P.App. 5a-6a]

The Seventh Circuit then concluded, not merely because of any first filed concept, but that:

> SIGECO **must be enjoined from harassing** the Purchasers and Midwestern by pursuing State regulatory proceedings **aimed at undoing the results** of a federal regulatory proceeding. [P.App. 8a].

Corrections Pursuant To S. Ct. Rule 15.2.[18] In addition to the corrections noted heretofore, SIGECO's Brief 2-8 contains

17. P.App. 3a, quoting *Town of Lockport v. Citizens for Community Action at Local Level Inc.*, 430 U.S. 259, 264, n.8 (1977)): "[P]rincipals of comity and federalism do not require that a federal court abandon jurisdiction that it has properly acquired simply because a similar suit is later filed in state court."

18. Sprinkled throughout the Petition and SIGECO's Brief are repeated references to "local distribution service" or "local delivery" of

(Cont'd)

not a single reference to the Record or Appendix as to any fact, but attaches a map concerning various pipelines, makes unsupported assertions about the quantity of SIGECO's sales to large industrial users, its territory, about supposedly having to provide service at some unknown cost if GPC or Scepter should return to the fold, that SIGECO doesn't want to sell gas to industrial users, the economic motive of pipelines to connect to an LDC, whether the GPC/Scepter arrangements foster competition — who knows the truth of these untested assertions and other statements which *dehor* the record? **SIGECO's Brief should be ignored or stricken.**

The only thing which is clear is that SIGECO tried to get GPC's business by making presentations to GPC, and failed. M.App. 26a. It also failed to convince FERC that there was "anti-competitive" behavior, or that Midwestern's interstate transportation was uneconomic, or that SIGECO had stranded costs, and failed in arguing that the IURC was not preempted. M.App. 15a-23a. Put simply — SIGECO was competing and lost.

Indiana has provided the means for SIGECO to compete by having special rates and tariffs for large industrial users, as well as the authority to negotiate contracts with such industrial users. *See* the discussion by the IURC, *In re Indiana Gas Company, Inc.*, 122 PUR. 4th 365, 1991 WL 501832 (Ind. URC, 1991). SIGECO now reaps the benefits of a competitive national market and purchases all of its gas in the same markets as GPC

(Cont'd)
gas to consumers by which they seek to replace the word "transportation" with "local distribution" — like "Midwestern contracted . . . to provide GPC with local distribution," SIGECO 2, or "the Court upheld [States'] authority to regulate an interstate pipeline's 'delivery service,' " mis-describing the *Panhandle* cases, Pet. 18, and misstating that the *Panhandle* cases hold "that States can exercise authority over 'bypass service' ", Pet. 7, 6. The mis-descriptions of facts and law are too many to correct.

and Scepter and no doubt purchases such gas in much, much larger quantities.[19]

What SIGECO is really seeking is exactly what Congress sought to avoid when it required FERC to take away monopoly power from the interstate pipelines, requiring them to unbundle and provide open access non-discriminatory transportation. Now SIGECO wants to have this monopoly power for itself and the other LDC's which would no doubt create the same anti-competitive conditions that existed prior to Order 636 and be subject only to regulation by Indiana so that the industrial consumers are captives to SIGECO. There can be no doubt that monopoly power in transportation will distort the competitive gas sales markets which Congress sought.

REASONS FOR DENYING OR DISMISSING THE PETITION

Question 1 — Presents Nothing But Petitioners' Concoctions. Finding no conflict between the decision of the Seventh Circuit and any of this Court or of the other circuits, petitioners embark upon a repetitious series of misquotes to create the illusion that the Seventh Circuit created a novel " 'seems' preempted" exception to *Younger*. These are patent misconstructions and this Court should summarily dismiss the Petition because there is no attempt to comply with S. Ct. Rule 14.1(a).

This Court in both *NOPSI* (where this Court found that the New Orleans City Council's actions were not clearly or facially seeking to regulate or interfere with wholesale rates) and in *Utility Commissioners of Ohio* (where this Court sustained enjoining the State Commission's actions and orders seeking to regulate wholesale rates which were clearly and facially preempted by the Federal Power Act), recognized that *Younger* abstention is not required where State proceedings or law is

19. *See In Re Southern Indiana Gas & Electric Company*, 2000 WL 33181398 at * 3 (Ind. URC 2000).

clearly, patently or facially invalid as encroaching upon exclusive federal jurisdiction.

The Seventh Circuit joined the holdings of the First, Sixth, Ninth and Eleventh Circuits pursuant to *Utility Commissioners of Ohio* and *NOPSI*[20] — that *Younger* abstention, which

20. P.App. 6a-7a, adopting *Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination*, 70 F.3d 1361 (1st Cir. 1995) (reversing the district court's abstention, holding: "a number of courts have held that *Younger* abstention is inappropriate where a claim of preemption is 'facially conclusive' and/or 'readily apparent', because no significant State interests are served. It is clear that the State tribunal has acted beyond the lawful limits of its authority."); *Bud Antle Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1995), *cert. denied*, 516 U.S. 1159 (1995) (reversing the district court's abstention under *Younger* where it was "readily apparent" that State agency's assertion of jurisdiction was preempted under Federal law); *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008 (6th Cir. 1994) (where the Court concluded that abstention is not required in a case presenting facially conclusive claims of Federal preemption), *Gartrell Construction Inc. v. Aubrey*, 940 F.2d 437, 441-42 (9th Cir. 1991) ("no significant State interest is served where the State law is preempted by Federal law and preemption is 'readily apparent.' . . . *Younger* abstention is not required. . . . Preemption is readily apparent under [Federal procurement regulation]"); *National Railroad Passenger Corp. v. State of Florida*, 929 F.2d 1532, 1537 & n.12 (11th Cir. 1991) ("in the present case, the new language of the Rail Passenger Service Act clearly indicates that State and local laws are preempted; thus, the District Court would not be required to abstain [under *Younger*] from enjoining any ongoing State criminal proceeding"); *Baggett v. Department of Professional Regulation, Board of Pilot Commissions*, 717 F.2d 521, 524 (11th Cir. 1993) (same); *Norfolk & W.Ry. v. Public Utils. Comm'n*, 926 F.2d 567, 573 (6th Cir. 1991) (determining that FRA preempted State administrative rule, preemption was "facially conclusive" so abstention not required); *see also Freehold Co.-Generation Associates v. Board of Regulatory Commissions*, 44 F.3d 1178-87 & n.6 (3d Cir. 1995), *cert. denied*, 516 U.S. 815 (1995) ("the alleged intrusive action is not by the federal government, but, on the contrary, by a state regulatory agency. We conclude that abstention is not appropriate in this case and does not

(Cont'd)

"presupposes that the State has a valid interest that it is seeking to enforce," is not required

> if the State does not have such an interest, if for example, it is seeking to regulate activities that clearly are under exclusive federal control. . . . *See Chaulk Services, Inc. v. Massachusetts Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995) and cases cited there. . . . Mere defiance of clear federal law removing an area from potential State regulation is not such an interest.[21] [P.App. 6a-7a.]

Here, Indiana by statute, and SIGECO by the proceedings in question, seek to regulate the interstate transportation of user purchased gas in one State to the end-user's facility in another State. This, the Seventh Circuit found, adopting the three other circuits that had so held ("It seems to us, as it has seemed to the other courts to have addressed the issue, [*see* n.26, *infra*]") is the transportation of natural gas in interstate commerce within FERC's § 1(b) jurisdiction, which in accordance with this Court's decisions is exclusive, preempting State regulation. *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, 489 U.S. 493, 506-07 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988).

Not able to challenge the correctness of the Seventh Circuit's adoption of the facially clear exception to *Younger*

(Cont'd)
warrant extended discussion"); *Communications Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (preemption must be "readily apparent" to prevent abstention).

21. Petitioners contend that *NOPSI* broadly defines the State's interest as being the "regulation of utilities" by the State, Pet. 10, but again selectively quote out of context, ignoring that the interest referenced in *NOPSI* is not simply regulating utilities but rather the more focused, limited State interest of "regulating *intrastate* retail rates" 461 U.S. at 377 (emphasis added).

and the adoption of the circuits which have found the interstate transportation of user- owned gas in one State to and including the last foot of transportation into the user's facility within FERC's exclusive jurisdiction, petitioners embark upon the concoction that the Seventh Circuit created a novel " 'seems' preempted" exception to *Younger*.

Petitioners' attribution of apparently dispositive significance to the single, commonplace phrase "It seems to us" in the Court of Appeals' opinion, while ignoring the parallel use "as it has seemed to the other courts" is at best is just plain silly — at worst, misleading. Pet. 12-13. As the parallel construction of this sentence demonstrates, the Seventh Circuit is describing its own holding ("It seems to us") in exactly the same terms as it is describing the holdings of the other circuits to address the issue. Petitioners do not and cannot contend that the opinions of these other circuits (*see* pp. 22-26, *infra*) are anything other than unequivocal holdings against petitioners' position. Described in the same terms ("seems"), so too is that of the Seventh Circuit — it is not a gratuitous "quick look", Pet. 11, 13, nor has it "lowered the bar to 'seems' preempted," Pet. 14, or to a "lax 'seems' preempted standard." Pet. 19.

Petitioners continue playing fast and loose in another "straw man" argument — the notion that the Seventh Circuit held the mere *assertion* of a preemption claim precludes *Younger* abstention. Pet. 13-14. The Court of Appeals again did nothing of the sort, but rather expressly recognized, in accordance with *NOPSI*, that any such rule "would be question begging." ("This is not to say that a defense of federal preemption automatically defeats *Younger*, the position rejected in [*NOPSI*]. That would be question begging. The State court has the same right and power to decide a defense of preemption as it does to decide any other federal defense") P.App. 6a-7a.

Petitioners then attack the circuits (now joined by the Seventh Circuit) on the facially clear or readily apparent exception to *Younger* as being a "full blown assault" by the

circuits on *Younger*. Pet. 13-14. (Petitioners do not and cannot identify a split in the circuits or identify even a single case supporting their own position, nor is this fairly within any question presented.) The "assault" is yet another figment of petitioners' imagination. These cases are based on *Younger*, *Utility Commission of Ohio*, and *NOPSI* and do no more than to recognize the necessity of a valid State interest as an "entry requirement" to the extraordinary circumstances needed to justify abstention in the first instance. (*See* n.20, *supra*.) The State perforce has no such interest where its actions clearly encroach upon an exclusive federal domain and are thus facially invalid. *Utilities Commission of Ohio* so holds with respect to State encroachment upon FERC's exclusive domain. 317 U.S. at 469. To say, as do the circuits' decisions, n.20, *supra*, that such facial invalidity of the State's asserted interest is "readily apparent", "conclusive", "facially conclusive", "clear", etc. are but different words for the same thing. Petitioners are casting about for error in the semantic nuances associated with synonymous terms without ever establishing a contravention of this Court's precedents.

Question 2 Presents Nothing. Much like Question 1, Question 2 is based upon a misconstruction that the Seventh Circuit rejected abstention "based on an appellate assumption" that the "regulatory commissioners are prosecuting the State proceedings to serve the commercial interest of a private utility. . . ." As set forth above, the Seventh Circuit's decision is well grounded, not based on any assumption. *See also*, *infra*, pp. 21-18. Obviously, there could have been no such assumption by the Seventh Circuit — the IURC is not prosecuting the State proceedings as petitioners represent. Quite the opposite, SIGECO brought all the proceedings, *see infra*, pp. 19-21. Petitioners voluntarily *stayed* SIGECO's proceedings "deferring the federal preemption issue for resolution by federal forums". M.App. 57a.

Question 3 Presents Nothing — SIGECO's Harassing, Vexatious Litigation. In Question 3, petitioners once again misconstrue, by taking out of context, several words in the Seventh Circuit's opinion. Petitioners assert that "in addition to its 'seems preempted' standard", the Seventh Circuit assertedly "swept away the rights of the State courts and agencies to decide the constitutionality of State laws" where a Federal agency "becomes first 'seised' of the dispute . . . to which the State is *not* a party." Pet. 19. Of course, Indiana was a party to the FERC proceedings. *See* n.15, *supra*.

But more importantly, the language upon which petitioners seize is but a part of the Seventh Circuit's analysis leading to its conclusions that the injunction sought by Midwestern "merely seeks to prevent vexatious litigation by a disappointed party, namely SIGECO, in the FERC regulatory proceeding," and that SIGECO "must be enjoined from harassing the purchasers and Midwestern by pursuing a State regulatory proceeding aimed at undoing the results of a Federal regulatory proceeding." P.App. 6a, 8a. These conclusions of the Seventh Circuit can only be viewed in the backdrop of its determination that *Younger* "has no application to a case such as this. . . , in which, . . . a **federal proceeding** (here before the Federal Energy Regulatory Commission) overlapping the state proceeding **reaches completion** while the state proceeding is still pending at an early stage".

The Court noted that SIGECO appeared in the FERC proceeding in which Midwestern sought certification, and made essentially all of the arguments against certification as it sought to raise in the Indiana proceedings, including that FERC should not rule before Midwestern received a certificate from the IURC. P.App. 5a.

So what confronted the Seventh Circuit, assertedly requiring abstention, ***was not*** merely IURC initiated proceedings against Midwestern with Midwestern running to federal court — the classical abstention case. Rather this case presents: (1) a first-

filed FERC case seeking the required FERC approval for unbundled interstate transportation of user-purchased gas in one State to the users' facilities in another State, (2) filed before SIGECO's petition to the IURC, (3) a FERC decision while the SIGECO petition had been voluntarily stayed by these petitioners' Order "deferring the federal preemption issue for resolution by federal forums," M.App. 57a, (which makes this case an inappropriate vehicle for this Court's consideration of any *Younger* issue), (4) in which FERC proceeding, the State appeared through the OUCC, (5) in which FERC proceedings SIGECO made all the various objections which it sought to remake before the IURC, (6) which FERC decision neither the State[22] nor SIGECO appealed as required to a federal circuit court of appeals, 15 U.S.C. § 717r(b) — and (7) SIGECO filed a further state court action against Midwestern, as well as two subsequent IURC proceedings against Midwestern, "aimed at undoing" the FERC decision.

If there was ever harassing, vexatious litigation, this case is it — *Younger* does not require abstention, unless *Younger* is "turned on its head"!

Interestingly, petitioners raise no error or challenge to the Seventh Circuit's determination that harassing, vexatious litigation does not require *Younger* abstention. Such has never been doubted in this Court's decisions. *Middlesex County Ethics Committee, etc. v. Garden State Bar Association*, 457 U.S. 423, 437 (1982) (because there was "no bad faith or harassment" or other exceptional circumstances dictating to the contrary, the federal court should abstain). Moreover, no principle of federal law, whether comity or statute,[23] is violated when state parties

22. "If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480, 97 S. Ct. 1898, 1904 (1977).

23. The situation presented here is similar to the "relitigation exception" recognized under the Anti-Injunction Act, 28 U.S.C. § 2283, (Cont'd)

and courts are enjoined from collaterally attacking final FERC orders. *See Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 259-60 (10th Cir. 1989), *cert. den.*, 497 U.S. 1003 (1990) (determining that an injunction should issue against State proceedings enjoining an interstate pipeline company from acting pursuant to a final FERC order which constituted an impermissible collateral attack on the FERC order, and abstention was inappropriate).

Seventh Circuit Correctly Determined FERC's Exclusive Jurisdiction Over Transportation Of User Purchased Gas In One State To User's Facility In Another State.

Petitioners and SIGECO want to exclude from FERC's interstate transportation — any transportation to an end-user, or the "last foot" into an end-user's facility.[24] No such language can be found in the NGA.

(Cont'd)
which allows a federal court to enjoin state proceedings "that attempt to readjudicate previously decided matters" creating vested federal rights. *See, e.g., Ramsden v. Agribank*, 214 F.3d 865, 868 (7th Cir. 2000). Like *Younger*, the Anti-Injunction Act prescribes a point of demarcation at which comity concerns end and an enforcement of federal judgments creating vested federal rights begins. In face of Midwestern's federally adjudicated right pursuant to the FERC certificates to provide interstate transportation service to GPC and Scepter, no more than the Anti-Injunction Act do principles of comity animating *Younger* abstention prohibit issuance of an injunction against SIGECO's "vexatious" and "harassing" collateral attacks on the FERC decision. P.App. 6a, 8a.

24. Petitioners term this "direct delivery to a consumer", Petition p. 19, or "delivery service to an end-user consumer," Pet. 18, or "local delivery service" to end-use consumers. Pet. 17. SIGECO's view of the marketplace is that while the purchase of gas has been deregulated, the second step — transportation from the wellhead to the LDC — is within FERC's jurisdiction but the final step is always "local distribution by the LDC" reserved to the States. SIGECO Brief, p. 6. SIGECO wants the "direct local service to reach all customers" excluded from interstate transportation. SIGECO Brief 8.

The plain language of § 1(b) grants FERC jurisdiction over "transportation of natural gas in interstate commerce" and defines "interstate commerce" as "commerce between any point in a State and any point outside thereof. . . ." 15 U.S.C. § 717a(7). The language and its applicability to the transportation of user-purchased natural gas in one State to the user's facility in another State is clear, unquestionable. It is, therefore, no surprise that petitioners can find no support in § 1(b) or any case of a Circuit Court of Appeals or of this Court[25] that the last foot of unbundled transportation of user-purchased gas in one State to the user's facility in another, is other than transportation in interstate commerce. Just as the Seventh Circuit found FERC's jurisdiction to be clear and exclusive, other circuits have likewise found FERC's jurisdiction over such unbundled transportation into the user's facility to be "undoubtable" "hardly conceivable" to find a better fit, "clearly within FERC's transportation jurisdiction".[26] This Court similarly found such

25. Petitioners reliance on *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) is simply wrong. *Tracy* did not rule on any issue in this case. In addition to acknowledging the holding of the circuits at n.14, this Court also noted the legislative changes since 1938 and that there might be questions raised by such and "we do not decide this issue," 519 U.S. at 305, n.13, and further noted that § 1(b) "remains unchanged," 519 U.S. at 305, n.13 but did not discuss that 15 U.S.C. § 3431 limited § 1(b) and other provisions of the NGA from applying to "first sales". Petitioners' reliance on *Panhandle-Indiana* and *Michigan* is also wrong. These cases said nothing of "local delivery service" being outside FERC's jurisdiction. Both decisions were grounded in § 1(b)'s grant of only wholesale, but not retail, sales jurisdiction to FERC and said nothing whatever about unbundled interstate transportation. Indeed, this Court in *Tracy* repeatedly described these cases as recognizing the power of States "to regulate all in-State gas sales directly to consumers. . . ." 519 U.S. at 281. Of course, the NGPA/NGWDA raise issues as to whether States can regulate "first sales", whether in-State or out-of-State in the new competitive national market. *See* n.8, *supra*.

26. *See Michigan Consol. Gas Co. v. Panhandle Eastern Pipeline Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (Cont'd)

within FERC's jurisdiction. *FPC v. Transcontinental Gas Pipeline, supra.*

There is no limitation on FERC's interstate transportation jurisdiction based on whether the gas is to be consumed or resold or whether it is the "last foot" to consumption. "The Act gives the Commission **jurisdiction** over interstate transportation of natural gas as a separate and distinct matter, whether

(Cont'd)

(1990) (Michigan PSC enjoined from asserting jurisdiction over FERC certificated unbundled interstate transportation of user-owned gas to user's facility where the Court found it "hardly conceivable" to find a better fit with FERC's interstate transportation jurisdiction); *Michigan Consolidated Gas Company v. FERC*, 883 F.2d 117, 120 (D.C. 1989), *cert. denied*, 494 U.S. 1079 (1990) (the Court had "no difficulty" affirming FERC's jurisdiction to grant a certificate of convenience and public necessity for the interstate transportation to a user's facility); *Public Utility Commission of California v. FERC*, 900 F.2d 269, 273-77 (D.C. Cir. 1990) (unbundled interstate transportation of user-owned gas is transportation of natural gas in interstate commerce does not end at the "last foot of pipe" before going into the end-user's facility); and *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1416 (10th Cir. 1992) (FERC has exclusive jurisdiction to authorize unbundled transportation services for user-owned gas to the user's facility as such "undoubtedly falls within" FERC's interstate transportation jurisdiction). *See also United Distribution Companies v. FERC, supra*, (FERC has interstate transportation jurisdiction over LDCs' capacity sales to their own end-users because gas sales element was severed, unbundled from the transaction, with FERC retaining jurisdiction over interstate transportation component, 88 F.3d at 1153, and sustaining FERC's exclusive transportation jurisdiction and regulatory preemption of States with respect to LDCs' buy/sell agreements with their users, *id.* at 1154-55); *National Fuel Gas Supply Corporation v. Public Service Commission of New York*, 894 F.2d 571, 579 (2d Cir. 1990), *cert. denied*, 497 U.S. 1004, 1105 S. Ct. 3240 (1990) (FERC has exclusive jurisdiction concerning replacement of 1.6 miles of interstate pipeline and not required to obtain a State environmental certificate because FERC has the authority to consider environmental issues, "State may not engage in concurrent site specific environmental review;" and *see also American Gas Association, supra*, and *Associated Gas Distributors, supra.*

the transportation is for hire or for sale and whether this sale is for consumption or resale." *United Pipeline Company v. Federal Power Commission, et al.*, 385 U.S. 83, 89 (1966). The independent jurisdictional grant over interstate transportation allows **FERC jurisdiction over** curtailment plans for both jurisdictional wholesales **and non-jurisdictional retail sales**, because the Act does not limit the interstate transportation jurisdiction, as it does the sales jurisdiction. *See Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) ("Though the [NGA's] application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale."), approved in *New York, supra*, 112 S. Ct. at 1022.

Just last month, in *New York, et al. v. Federal Energy Regulatory Commission, et al., supra*, based on similar unambiguous language in a nearly identical provision of the Federal Power Act, 16 U.S.C. § 824(b), this Court affirmed FERC's regulation of unbundled retail electric transmissions based on FERC's exclusive jurisdiction over "the transmission of electric energy in interstate commerce. . . ." 16 U.S.C. § 824(b), *see* n.2, *supra*.

> The statutory text thus unambiguously authorizes FERC to assert jurisdiction over two separate activities — transmitting and selling **[just as does the NGA over transportation and selling].** It is true that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market **[as under the NGA for gas]**. However, FERC's jurisdiction over electric transmission contains no such limitation **[neither does the NGA for transportation].** Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer **[as does the**

> **NGA over interstate transportation]**, FERC's exercise of this power is valid. [112 S. Ct. at 1024].

Change the words "transmission" to "transportation" and "electric" to "gas", and the cases are indistinguishable.

Petitioners' reliance on the terms "local distribution" in the proviso portion of § 1(b) (much like the proviso language of the FPA) to encompass the last foot of interest transportation to an end-user was rejected in all of the circuit court cases (and in *New York*, *supra*, under the FPA).[27] This Court has repeatedly held the proviso language is "surplusage" and does not limit "any jurisdiction otherwise granted under § 1(b)" and is to be strictly construed. *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 471 (1950) (the terms "local distribution" in the proviso were "surplusage which was 'not actually necessary' "); *Federal Power Commission v. Louisiana Power & Light Co., et al.*, 406 U.S. 621, 638 (1972) ("it is well established that the proviso was added to the Act merely for

---

27. *Public Utilities Commission of California*, *supra*, 900 F.2d at 276 (distribution conjures up receiving a large quantity of some good and parceling it out among many takers. The legislative history of the Natural Gas Act supports this view and undercuts any suggestion that final delivery to an end-user transfers the terminal stage of transportation into distribution); *Cascade Natural Gas*, 955 F.2d at 1418-21 ("local distribution' as Congress viewed the term, involves two components, the retail sale of natural gas and its local delivery, normally through a network of pipelines designed to supply local consumers" such that "by-pass transactions did not entail the realm of local retail sales that Congress intended to reserve to the States" *Michigan Consolidated Gas Co.*, *supra*, 883 F.2d at 121-22 (rejecting the argument that by-pass to an end-user involves "local distribution" where the gas was purchased out-of-State from third parties and the pipeline merely transported the gas into an end-user in interstate commerce). *See also Oklahoma Natural Gas Co. v. Federal Energy Regulatory Commission*, 906 F.2d 708, 710 (D.C. Cir. 1990) (local distribution is "a network of small local lines used to transmit gas from a large interstate pipeline to individual consumers spread out in a local geographic area — not a high pressure line connecting an interstate pipeline to a single end-user").

clarification and was not intended to deprive FPC of any jurisdiction otherwise granted by § 1(b)."); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1954) ("we noted that '[e]xceptions to the primary grant of jurisdiction in § 1(b)(1) ought to be strictly construed' "); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690-91 (1947) (same).

The Circuit Courts of Appeal have uniformly held that the meaning of "local distribution" is not merely transportation to an end-user, but the breaking down, parceling out *and sale* of gas to multiple users in a local area, n.27, *supra*. "Insofar as Congressional committees spoke to the matter, therefore, they appear to have viewed distribution as confined to its parceling out function (and probably) even more narrowly, to parceling out accompanied by retail sales." *Public Utility Commission of California*, 900 F.2d at 276 (emphasis in original).

Merely because transportation is provided by local distribution companies to gas users does not mean that it is not the transportation of natural gas in interstate commerce — interstate transportation jurisdiction extends to the local distribution companies' sales of unbundled transportation capacity to the their own end-users where the gas sales element and the transportation element are severed, unbundled with FERC maintaining jurisdiction over the interstate transportation element. *See United Distribution Companies v. FERC*, *supra*, 88 F.3d at 1150-56 (sustaining various aspects of Order 636's mandatory unbundling and that the interstate transportation jurisdiction extends to FERC's regulation of local distribution companies' capacity sales and buy/sell arrangements of transportation to their end-users, and preempts State regulation to the contrary.)

Aside from the clear language in § 1(b), later provisions of the NGPA and the NGWDA also demonstrate that FERC's interstate transportation jurisdiction encompasses the last foot of transportation of user-owned gas from out-of-State into the user's facility in-State. For instance, consistent with the historical

definition of local distribution, Congress in the NGPA expressly defined "distribution companies" as engaged in the breaking down and parceling out of natural gas and sales for consumption. *See* NGPA § 2(17), where Congress defined a local distribution company as "any person, other than an interstate pipeline or intrastate pipeline engaged *in the transportation*, or local distribution, of natural gas *and the sale* of natural gas for ultimate consumption." 15 U.S.C. § 3301(17) (emphasis added). Nothing in this definition indicates that Congress ever considered transportation of user-owned gas to an end user for consumption (or at the "last foot") to be the domain of local distribution.

In 1978 as a part of the Congressional effort to attack the imbalances in the natural gas supply, Congress amended NGA § 7 to allow FERC to give preference or discriminate in certificating unbundled interstate transportation of user-owned gas to high priority users' facilities. 15 U.S.C. § 717f(c)(2); M.App. 1a-2a. If FERC did not have jurisdiction over transportation of user owned gas in interstate commerce into an end-user's facility pursuant to § 1(b), the amendment would make no sense. Concurrently, in the 1978 NGPA, Congress sought to protect previous certifications for unbundled transportation of user-owned natural gas into utility generation units by prohibiting FERC from revoking any earlier granted certificate for such transportation into generating facilities to replace coal because of such use being an unpreferred use, i.e. gas versus coal.. 15 U.S.C. § 3394(a): "[T]he Commission may not . . . revoke or amend any certificate of public convenience and necessity issued before January 1, 1969 under Section 7 of the Natural Gas Act . . . for the transportation of natural gas owned by any electric utility . . ." for a ten year period after November 9, 1978. App. at 3a. Again, Congress recognized FERC's § 1(b) interstate transportation authority over the transportation of user-purchased gas in one State into the user's facility in another State.

Finally, in the 1992 Energy Policy Act, Congress expressly affirmed the competition which it had encouraged, not only in the integrated, competitive and unregulated national gas market, but also competition in transportation markets. Congress considered further amendments to the NGA and NGPA as a part of the Energy Policy Act of 1992 including requiring 60 day notice to an LDC of a prospective bypass so state commissions could consider providing more flexible rates for a LDC to compete. *See* House Rept. No. 102-474(I) re proposed Sec. 204, "Rules in Local Distribution Bypass Cases." 1992 USCCAN 1953 (102nd Cong., 2d Sess., 1992) Instead, Congress enacted a declaration that "natural gas consumers and producers, and the national economy, are best served by competitive natural gas wellhead market." P.L. 102-486, Sec. 202, entitled "Sense of Congress".[28]

In sum, Congress has created an integrated, deregulated competitive national market for the sale and purchase of natural gas, including sales to any end-user. It also recognized that for there to be a market where the lowest cost producers could reach the highest bidding purchasers, and vice versa, FERC had to require unbundled, open access transportation. This allowed the LDC's and the industrial users to bypass the interstate pipelines and purchase gas from others in the integrated national market.

Petitioners and SIGECO now argue the last foot of interstate transportation to any consumer is subject to State jurisdiction. If this is true, then all Congress accomplished in the last 25 years is to transfer the "market function subject to market power" — that is, a monopoly power — from the interstate pipelines to the LDC's and to exclusive State jurisdiction.

---

28. Here, there is no plain meaning to overcome. In fact, the plain meaning is established independently of the foregoing. *See Solid Waste Agency of Northern Cook County v. United States Army Corp.*, __ U.S. __, 121 S. Ct. 675, 681 (2001).

That is ridiculous. If this were true, Congress would have changed it, too.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be dismissed or denied.

Respectfully submitted,

JANET K. PLACE
General Counsel
NORTHERN PLAINS NATURAL GAS COMPANY
1111 South 103rd Street
Omaha, Nebraska 68124-1000
(402) 398-7886

G. DANIEL KELLEY, JR.
Counsel of Record
WILLIAM P. DIENER
EDWARD P. STEEGMANN
ICE MILLER
One American Square
Box 82001
Indianapolis, Indiana 46282
(317) 236-2100

Attorneys for Respondent
Midwestern Gas Transmission Company

APPENDIX

APPENDIX A — ADDITIONAL STATUTORY PROVISIONS

15 U.S.C.A. § 717. Regulation of natural gas companies

* * *

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * *

15 U.S.C.A. § 717f. Construction, extension, or abandonment of facilities

* * *

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities

or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of —

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

* * * *

15 U.S.C.A. § 3394. Limitation on revoking or amending certain pre-1969 certificates of public convenience and necessity

(a) General rule

The Commission may not, during the 10-year period beginning on November 9, 1978, revoke or amend any certificate of public convenience and necessity issued before January 1, 1969, under section 7 of the Natural Gas Act [15 U.S.C.A. 717f] for the transportation of natural gas owned by any electric utility except upon the application of the person to whom such certificate was issued.

* * * *

Appendix A

15 U.S.C.A. § 3431. Coordination with the Natural Gas Act

(a) Jurisdiction of the Commission under the Natural Gas Act

(1) Sales

(A) Application to first sales

For purposes of section 1(b) of the Natural Gas Act [15 U.S.C.A. § 717(b)], the provisions of the Natural Gas Act [15 U.S.C.A. § 717 et seq.] and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas.

* * * *

Ind. Code § 8-1-2-87 Gas utilities; necessity certificates; requirements

Sec. 87. (a) When used in this section, unless the context otherwise requires:

(1) The term "gas" means natural gas, artificial or manufactured gas, and mixed gas.

(2) The term "necessity certificate" means a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this section, which certificate shall be deemed an indeterminate permit.

Appendix A

(3) The term "rural area" means territory within the state of Indiana that is outside the corporate limits of a municipality.

(4) The term "gas utility" means and includes any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the state of Indiana for his, its or their domestic, commercial, or industrial use.

(5) The term "gas distribution service" means the furnishing or sale of gas directly to any consumer within the state of Indiana for his or its domestic, commercial, or industrial use.

(b) It is hereby declared that in order adequately to protect the public interest in the distribution of gas to consumers within the state of Indiana, it is necessary and desirable that to the extent provided in this section the holding of necessity certificates should be required as a condition precedent to the rendering of gas distribution service in rural areas of the state of Indiana.

(c) After February 26, 1945, no gas utility shall commence the rendering of gas distribution service in any rural area in the state of Indiana in which it is not actually rendering gas distribution service on February 26, 1945, without first obtaining from the commission a necessity certificate authorizing such gas distribution service, defining and limiting specifically the rural area covered thereby, and stating that public convenience and necessity require such gas distribution service within such rural area by such gas utility; and no gas utility required by this section to hold a

necessity certificate for any rural area shall render gas distribution service within such a rural area to any extent greater than that authorized by such necessity certificate or shall continue to render gas distribution service within such a rural area if and after such necessity certificate has been revoked or transferred as in this section provided.

* * * *

Ind. Code § 8-1-2-87.5 Transportation of gas; necessity certificate; application; public hearing; grounds for granting certificate; revocation

Sec. 87.5. (a) For purposes of this section, "transportation of gas" means physical transmission, exchange, backhaul, displacement, or any other means of transporting gas, including gathering.

(b) Any person, corporation, or other entity that:

(1) is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state;

(2) is engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers; or

(3) is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed;

is a public utility as defined in section 1 of this chapter and must obtain a necessity certificate from the commission before it may engage in any activities described in this subsection. This subsection does not apply to a gas utility operating pursuant to an indeterminate permit or necessity certificate issued under section 87 of this chapter, nor to the production, sale, and gathering of natural gas produced in Indiana.

Ind. Code § 8-1-2-87.6 Exemption of Indiana produced natural gas; petition and hearing on rates for purchase or transport

Sec. 87.6. (a) Except as provided in this section, the production, gathering, sale, or transportation of Indiana produced natural gas is exempt from this chapter.

(b) Any person, corporation, or other entity engaged in the production, gathering, sale, or transportation of natural gas produced in Indiana may petition the commission to:

(1) require a gas utility certified under section 86 or 87 of this chapter to purchase or transport Indiana produced natural gas owned by the petitioning entity; and

(2) set the rates for the purchase or transportation of that gas.

* * * *

APPENDIX B — OPINIONS, ORDERS AND NOTICES OF THE FEDERAL ENERGY REGULATORY COMMISSION ISSUED DECEMBER 16, 1998

Commission Opinions, Orders and Notices

Midwestern Gas Transmission Company

Docket No. CP98-538-000

Order Authorizing Construction and Operation of Facilities Under Blanket Certificate and Denying Protests

(Issued December 16, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt H (acute)ebert, Jr.

On May 12, 1998, Midwestern Gas Transmission Company (Midwestern) filed a prior notice request pursuant to its Part 157 blanket certificate issued in Docket No. CP82-414-000[1] and the prior notice procedures provided in Sections 157.205 and 157.211 of the Commission's regulations, for authorization to construct and operate a delivery tap, a delivery lateral, and a meter station. The proposed facilities will be used to transport and deliver gas to a new customer, Grain Processing Corporation (GPC), an industrial end-user. In accordance with the discussion below, we will grant Midwestern's request.

---

1. 20 FERC P 62,411 (1982). Southern Indiana Gas and Electric Company argues in its protest that Midwestern erroneously relies on a blanket certificate issued in Docket No. CP82-412-000 to Midwestern's affiliate, East Tennessee Natural Gas Company. Although Midwestern inadvertently used the East Tennessee docket number in its prior notice application, we are authorizing Midwestern's request under its blanket certificate which was issued in Docket No. CP82-414-000.

Appendix B

I. Background and Proposal

Midwestern is a natural gas company under the Natural Gas Act (NGA), engaged in the transportation of natural gas in interstate commerce and the construction of facilities for the transportation of gas pursuant to Part 284 and Part 157, respectively, of the Commission's regulations.

GPC is a manufacturer and marketer of various corn-based products. It is constructing a new corn processing plant in Daviess County, Indiana that it intends to make fully operational during the summer of 1999. GPC plans to begin receiving natural gas supplies in early 1999 to test its new equipment before the plant becomes fully operational. GPC requested service from Midwestern which then filed the prior notice request at issue in this proceeding.

Midwestern proposes to install an 8-inch hot tap on its 30-inch diameter, 2100 Line in Knox County, Indiana, on its existing right-of-way; install 2.84 miles of 8-inch lateral line extending from the proposed hot tap to GPC's new plant in Daviess County, Indiana; and install a meter station with dual 6-inch orifice meter runs and electronic gas measurement equipment (EGM) on a site provided by GPC. Midwestern proposes to own, operate, and maintain the hot tap, interconnecting pipeline, meter station and EGM.

In addition, Midwestern proposes to construct and install a dual run, two-stage pressure regulator, gas heating facilities and odorization facilities which GPC will own, operate, and maintain.

Appendix B

Midwestern states that the project will cost approximately $2,760,000 for which it will be reimbursed by GPC. The proposed lateral would have a maximum volume of 40,000 Dth of natural gas. Midwestern plans to deliver up to 10,000 Dth/d of natural gas to GPC.

During the winter of 1998/1999, Midwestern proposes to commence delivery of small amounts of gas to GPC to test GPC's plant processing equipment pursuant to an interruptible gas transportation agreement under Midwestern's Rate Schedule IT. When GPC's plant begins full operation during the summer of 1999, Midwestern will provide service pursuant to a firm transportation agreement under Midwestern's Rate Schedule FT-A.

Midwestern states that it does not expect the addition of the proposed facilities to have any significant impact on its peak day and annual deliveries. Further, Midwestern states that it will have sufficient capacity to accomplish deliveries to GPC without detriment or disadvantage to its other customers.

II. Interventions, Protests and Answers

Pursuant to Section 157.205(i), authorization to construct and operate qualifying facilities under a blanket certificate is automatic provided no protests to the activity are filed within 45 days of the date notice is issued by the Commission. If a protest is filed, authorization is granted if the protest is withdrawn within 30 days after the 45-day notice period.[2]

2. See Sections 157.205(h) and (I)(2) of the Commission's regulations.

Appendix B

If a protest is not withdrawn, the prior notice request proceeds as an application for case-specific authorization.[3]

On June 1, 1998, in accordance with Section 157.205 of the Commission's regulations, notice of Midwestern's prior notice request was published in the Federal Register (63 Fed. Reg. 29723). Within the 45-day notice period provided by the prior notice procedures, timely, unopposed motions to intervene were filed by the Indiana Office of Utility Consumer Counselor; GPC; Proliance Energy, LLC; Northern Indiana Public Service Company (NIPSCO); and Southern Indiana Gas & Electric Company (SIGECO).[4] SIGECO filed a request for an evidentiary hearing.

NIPSCO and SIGECO also filed protests to Midwestern's proposal which they have not withdrawn. They argue that Midwestern's construction and operation of the lateral pipeline without state authorization would violate Indiana law. Further, they contend that Midwestern's proposal may be anti-competitive, lacks market support, would result in wasteful duplication of facilities, would increase costs borne by SIGECO's customers, and would have substantial adverse environmental impact.

Midwestern and GPC filed answers to the protests. SIGECO filed a response and motion requesting the Commission to accept the pleadings SIGECO filed with the

---

3. See Section 157.205(g) of the Commission's regulations.

4. Timely, unopposed motions to intervene are granted by the operation of Rule 214 of the Commission's regulations (18 C.F.R. § 385.214).

Indiana Utilities Regulatory Commission (IURC) that are related to this proceeding. Midwestern and GPC filed answers and motions requesting the Commission to accept the pleadings they filed with the IURC. While our rules do not permit answers to protests or to answers,[5] we may, for good cause, waive a rule.[6] We find good cause to do so in this instance. To ensure a complete and accurate record, we will accept all pleadings tendered to date for filing.

III. Discussion

A. Jurisdiction

SIGECO contends that Midwestern's construction and operation of the proposed lateral pipeline without state authorization would violate Indiana law. SIGECO states that it has filed a pending petition before the IURC, arguing the point.[7] SIGECO contends that Indiana law requires Midwestern, as a gas utility in Indiana, to obtain a certificate

5. See 18 C.F.R. § 385.213(a)(2).

6. 18 C.F.R. § 385.101(e).

7. SIGECO filed a petition with the IURC requesting that it issue an order directing Midwestern "to cease and desist from engaging in the rendering of gas service in rural areas of Indiana, including the transportation of gas from outside Indiana for direct sale or delivery to consumers within the state" on grounds that Midwestern's proposed service to GPC would violate Indiana Code sections 8-1-2-87 and 8-1-2-87.5. Midwestern has moved to dismiss SIGECO's petition arguing that the IURC has no authority to require Midwestern to receive state authorization before it may provide the service proposed in this proceeding.

of public convenience and necessity from the IURC since Midwestern would be transporting natural gas from outside Indiana for direct delivery to an end-user within the state.[8]

SIGECO cites Public Service Commission of Indiana v. Panhandle Eastern Pipe Line Company (Indiana v. Panhandle) to support its argument that certain activities of natural gas pipeline companies are subject to IURC regulation.[9] SIGECO maintains that the Indiana state court found, and the United States Supreme Court affirmed, that the business of transporting and selling natural gas for ultimate distribution to the public is affected with the public interest mandating state regulation and control. Further, the court found Panhandle to be a public utility subject to state regulation with respect to direct sales to end-users.

SIGECO and NIPSCO argue that the Commission should not act on Midwestern's application until after the IURC issues a final order in response to SIGECO's petition before the IURC. They contend that the IURC should have the initial opportunity to apply state law to the facts of this case and that the IURC's findings are material to the Commission's public convenience and necessity analysis.

---

8. Citing Indiana Code, Section 8-1-2-87.5 which states: [a]ny person, corporation, or other entity that is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end-use consumer or consumers within this state must obtain a necessity certificate from the [IURC] before it may engage in [such transportation of gas].

9. 71 N.E. 2d 117 (Ind.), aff'd, 332 U.S. 507 (1947).

Appendix B

SIGECO states that many of the issues before the Commission, including the application of Indiana law to Midwestern's application, the extent to which the NGA may preempt aspects of state law, and the manner in which these jurisdictional boundaries should be drawn with regard to this project, are also pending before the IURC. SIGECO contends that the Commission should defer further action on Midwestern's application pending a decision from the IURC on the issues of state law and the appropriate division between state and federal authority as it applies to the facilities and services proposed by Midwestern.

In that regard, SIGECO submits that the Commission has shown substantial deference to state commissions on jurisdictional determinations. For example, it states, in Order No. 888, the Commission acknowledged in the electric regulation context that defining the boundary between state and federal jurisdiction would be highly case-specific, and indicated that it would defer generally to state commissions, applying the Commission's seven local distribution indicators, to determine "where to draw the jurisdictional line" as to public utilities providing electric transmission service.[10]

---

10. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 P 31,036, at pp. 31,783-84 (1996), order on reh'g, FERC Statutes and Regulations P 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC P 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC P 61,046 (1998).

Appendix B

Midwestern and GPC respond that no portion of the service Midwestern proposes to provide to GPC involves the local distribution of gas. Rather, they maintain, Midwestern will provide interstate transportation of natural gas directly to an end-user and thus the service is subject to the Commission's exclusive NGA jurisdiction.

Commission's Response

Section 1(b) of the NGA gives the Commission jurisdiction over the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and the natural gas companies engaged in such transportation or sale.[11] Section 1(b) reserves to the states jurisdiction over any other sale of natural gas and the local distribution of gas.

Further, the Commission's jurisdiction, where it applies under the NGA, is exclusive.[12] Thus, the Commission has exclusive jurisdiction over the transportation of natural gas in interstate commerce and the facilities used for such transportation.[13]

11. 15 U.S.C. § 717(b).

12. See Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, 109 S.Ct 1262, 1274 (1989); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-01 (1988) (Schneidewind); Northern Natural Gas Co., v. State Corporation Commission of Kansas, 83 S.Ct. 646, 650 (1963); Public Utilities Commission of California v. FERC, 900 F.2d 269, 274 (D.C. Cir. 1990) (California PUC); National Fuel Gas Supply Corp. v. Public Service Commission of New York, 894 F.2d 571, 576-77 (2d Cir. 1990), cert. denied, 497 U.S. 1004 (1990) (National Fuel).

13. Schneidewind, 485 U.S. at 299-301; National Fuel, 894 F.2d at 576-77.

Appendix B

In interpreting the NGA and its legislative history, the Commission and the courts consistently have held that the transportation of natural gas by an interstate pipeline directly to an end-user constitutes transportation in interstate commerce, not local distribution, and, as such, is subject to the Commission's exclusive jurisdiction.[14] Both the Commission and the courts consistently have concluded that tie-in facilities such as valves, meters and lateral lines (i.e., the facilities Midwestern proposes to construct to serve GPC) which are integrated with a pipeline's interstate transmission system, and which are designed to connect such pipeline system to an end-user, are not local distribution facilities.[15]

---

14. See Cascade Natural Gas Corp. v. FERC (Cascade), 955 F.2d 1412, 1417-19; Oklahoma Natural Gas Co. v. FERC (ONG), 906 F.2d 708, 710 (D.C. Cir. 1990); Public Utilities Commission of California v. FERC (California PUC), 900 F.2d 269, 277 (D.C. Cir. 1990); Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117, 121-22 (D.C. Cir. 1989), cert. denied 494 U.S. 1079 (1990); Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 689 F.Supp. 729,732-38 (W.D. Mich. 1988), aff'd, 887 F.2d 1295, 1300-01 (6th Cir. 1989, cert. denied, 494 (1990); KN Wattenberg Transmission Limited Liability Co. (KN Wattenberg), 81 FERC P 61,167, at pp. 61,739-90 (1997); Panhandle Eastern Pipe Line Co., 64 FERC P 61,211 (1993); Mojave Pipeline Co., 41 FERC P 61,040, at pp. 61,116-18 (1987), order on reh'g, 42 FERC P 61,351, at p. 62,002 (1998) (Mojave).

15. ONG, 906 F.2d at 710 (lateral line connecting interstate pipeline to end-user is not a local distribution line); California PUC, 900 F.2d at 277 (acts which constitute interstate transportation remain as such even though they end in deliveries to end-users through tie-in facilities); KN Wattenberg, 81 FERC at p. 61,739 (a lateral is not

(Cont'd)

Further, in determining where interstate transportation ends and local distribution begins, the Commission has stated that the term "local distribution facility" connotes a network of small local lines used to transmit gas from a large interstate pipeline to individual consumers spread out in a local geographic area — not a high-pressure line connecting an interstate pipeline to a single end-user. The courts have agreed: "[d]istribution conjures up receiving a large quantity of some good and parcelling it out among takers."[16]

In FPC v. East Ohio Gas Company (EastOhio),[17] the United States Supreme Court held that Commission jurisdiction extended over "the high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains."[18] In California PUC, the court held that "acts which constitute transportation for Section 1(b) purposes under East Ohio remain such even though they end in delivery

---

(Cont'd)
a local distribution facility); Williams Natural Gas Co., 46 FERC P 61,160, at p. 61,559 (lateral which connects mainline to end-user is an essential and integral element of the interstate transportation of natural gas).

16. California PUC, 900 F.2d at 276; ONG, 906 F.2d 710.

17. 338 U.S. 464 (1950).

18. Id. at 470. In response to the Court's finding in East Ohio, Congress later amended the NGA by creating the Hinshaw exception which exempts from the Commission's jurisdiction transportation by a company that operates exclusively in one state if its rates and services are regulated by the state. See NGA § 1(c) 15 U.S.C. § 717(c).

(at high pressure) to end-users."[19] The circuit court distinguished a 1951 United States Supreme Court case that upheld Michigan's power to veto the retail sale by an interstate pipeline to a large end-user despite exclusive federal jurisdiction over the interstate transportation of the gas[20] on the basis that the transaction at issue involved the bundled sale of gas to the end-user.[21] The court stated that "under modern conditions where the end-user often owns the gas and uses the pipeline solely for transportation, application of East Ohio removes this fulcrum for state power."[22] In Cascade, the court declined to decide the jurisdictional issue based on the pressure in the line but instead relied on the fact that the pipeline's bypass of an LDC to directly serve an end-user involved only interstate transportation and did not involve a retail sale of gas by the pipeline to the end-user.[23]

Thus, under any of these lines of reasoning, Midwestern's proposed service to GPC constitutes interstate transmission of natural gas, not local distribution. Midwestern will deliver the gas to GPC at mainline pressure, there is no retail sale by Midwestern to GPC, and Midwestern will not deliver the gas through a network of small local lines connected to individual consumers within a local geographic area.

---

19. 900 F.2d at 277.

20. Panhandle v. Michigan, 341 U.S. 329 (1951).

21. 900 F.2d at 277.

22. Id.

23. 955 F.2d at 1420.

Appendix B

SIGECO's reliance on Indiana v. Panhandle is misplaced. In that case, the Court found that states have jurisdiction over a pipeline's direct sale of natural gas to an end-user. Midwestern is not proposing to make direct sales to GPC; its proposal involves only interstate transportation of gas. Further, the courts and the Commission have explicitly found that Indiana v. Panhandle is inapposite where the pipeline is merely transporting gas supplies directly to an end-user as in this case.[24]

SIGECO's reliance on Order No. 888 to support its argument that the Commission should defer to the IURC regarding our jurisdiction over Midwestern's proposed facilities and transportation service is equally unavailing. In Order Nos. 888 and 888-A, the Commission never stated that it would defer to states in determining whether the Commission or the state has jurisdiction over electric transmission. Indeed, the Commission emphasized that "if unbundled retail transmission in interstate commerce occurs voluntarily by a public utility or as a result of a state retail access program, the Commission has exclusive jurisdiction over the rates, terms and conditions of such transmission."[25] Rather, the Commission explained that, where states unbundle retail sales, "it will give deference to their determinations as to which facilities are transmission and which are local distribution," provided the states making such determinations apply the seven criteria established by the

---

24. Cascade, 955 F.2d at 1417-19; Panhandle Eastern Pipe Line Co., 42 FERC P 61,076, at pp. 61,389-49 (1988).

25. Order No. 888-A at p. 30,335.

Commission in Order No. 888,[26] and it did so in order to allocate costs and set rates properly for both transmission and local distribution services.[27]

The circumstances discussed in Order Nos. 888 and 888-A do not parallel those at issue in this proceeding. In Order Nos. 888 and 888-A, the Commission was addressing unbundled retail transmission and the deference to be accorded a state regulatory authority's recommendations for drawing of a jurisdictional line between Commission-jurisdictional and state-jurisdictional facilities for purposes of allocating costs and setting rates.[28] Here, in contrast, we are not dealing with a state-approved unbundling of retail sales or the cost allocation and ratemaking consequences of such action by a state.

SIGECO contends that Midwestern's and GPC's argument that the Commission has exclusive jurisdiction over interstate transportation does not necessarily divest the IURC of its jurisdiction over Midwestern's proposal. SIGECO points to General Motors v. Tracy (Tracy), in which the United States Supreme Court discussed the evolution of state and federal regulation of natural gas markets, including the changes that have enabled large industrial customers to contract to receive service directly from interstate pipelines, rather than from an LDC.[29] According to SIGECO, the Court states that these

---

26. Id.

27. Id. at pp. 30,336-37.

28. Id. at pp. 30,336-37.

29. 117 S.Ct. 811 (1997).

regulatory changes did not undermine the states' authority over matters that affect the service to be provided to captive customers served by LDCs.[30] Further, SIGECO contends, the Court stated that the rate impact on an LDC's captive customers resulting from a large industrial customer choosing to avoid service from an LDC had an impact on local interests sufficient to support regulation by the state. Finally, SIGECO maintains, the Court specifically refused to endorse decisions of various courts of appeal that have ruled that the Commission has sole authority to regulate bypass transactions where the sale of gas occurs outside of the state and the interstate pipeline company merely transports gas to the industrial customers.[31]

SIGECO's argument that the Supreme Court's decision in Tracy supports SIGECO's position that the IURC has the authority to review Midwestern's proposal is without merit. Tracy did not address the specific issue raised by SIGECO in this proceeding. In Tracy the Court was addressing a challenge to Ohio's sales tax exemption for gas sales made by state-regulated LDCs, but not for sales by gas marketers. The issue was whether the opportunities for competition between gas marketers and LDCs to supply gas to end-users

---

30. Id. at 817.

31. Id. at n.14. (Specifically, the Court cites Cascade, 955 F.2d at 1414-1422; Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 887 F.2d 1295, 1299-1301 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990); Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117, 121-122 (D.C. Cir. 1989), cert. denied, 494 U.S. 1079 (1990). The Court stated "[w]e express no view on the correctness of these decisions").

require treating them as similarly situated for Commerce Clause purposes. The Court held that they were not similarly situated for claims of facial discrimination since the LDCs' state-regulated bundled gas product was sufficiently distinguished from the independent marketers unbundled gas sales. Therefore, Ohio's tax on independent marketers' gas sales did not violate the Commerce Clause.

In support of its conclusion that states have a legitimate interest in regulating gas sales to consumers, the Court referenced the NGA's mandate that states have the authority to regulate retail sales of natural gas (including direct sales to industrial customers) and its prior decisions upholding such mandate.[32] The Court recognized, however, that the NGA and the Commerce Clause prohibit the states from regulating the interstate transportation of natural gas.[33] Nowhere did the Court state or suggest that states have the authority to regulate the interstate transportation of natural gas by an interstate pipeline directly to an end-user.

Further, SIGECO erroneously characterizes the Tracy footnote in which the Court states that it "expresses no view" on the correctness of the decisions by several U.S. Courts of Appeals upholding the Commission's NGA jurisdiction to regulate the transportation of gas by an interstate pipeline directly to an end-user.[34] The Court's statement in the footnote

---

32. Tracy, 117 S.Ct, citing Panhandle v. Indiana, 332 U.S. 507 (1947), and Panhandle v. Michigan, 341 U.S. 329 (1951).

33. 117 S.Ct. at 820-21.

34. Id. at 827, n.14.

was not a refusal to endorse the referenced decisions; rather, the Court explicitly disavowed any view on the bypass decisions.

Further, the cited footnote in no way challenges or undermines the integrity of the appellate decisions (two of which the Court refused to consider upon petitions for certiorari)[35] that confirm the Commission's preemptive certificate authority over transportation facilities. Rather, the Court's denial of certiorari suggests that the Court found that those cases either did not decide an important question of federal law that needed to be settled by the Court or did not decide an important federal question in a way that conflicts with relevant decisions of the Court.[36]

Finally, the Commission has rejected claims similar to SIGECO's contending that Indiana certification was needed for an interstate transportation project. In Panhandle Eastern Pipe Line Company, the Commission stated "[c]oncerning the need for state certificate authorization, it is clear that Panhandle's proposal involves the transportation of natural gas in interstate commerce over which the Commission has exclusive jurisdiction. Thus, Indiana has no jurisdiction in

---

35. See Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117 (D.C. Cir. 1989), cert. denied, 494 U.S. 1079 (1990); Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 689 F.Supp. 729 (W.D. Mich. 1988, aff'd 887 F.2d 1295 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990).

36. See Rule 10 of the Rules of the Supreme Court of the United States.

this matter and a state certificate is not required."[37] We affirm that decision here.

For all the reasons discussed above, we find that the Commission has exclusive jurisdiction over Midwestern's proposal and that Midwestern is not required to obtain a certificate from the IURC to construct and operate the facilities or to provide transportation service to GPC through those facilities.

B. Bypass Arguments

SIGECO states that GPC's new plant is located within SIGECO's franchise area and is less than one-half mile from its existing natural gas distribution system. Thus, SIGECO argues, Midwestern's proposal is an uneconomic and unreasonable bypass of SIGECO's system with potentially severe impacts on it and its existing customers. Further, SIGECO contends, to the extent that it is unable to serve large industrial customers located within its service territory because an interstate pipeline decides to provide direct distribution service to an end-user, the fixed costs of SIGECO's distribution system will be spread among a progressively smaller customer base. SIGECO argues that this puts upward pressure on its rates which harms customers, limits growth, and erodes its competitive position.

The Commission has held that pipeline service to new customers who are not currently receiving gas service from

---

37. Panhandle Eastern Pipe Line Co., 64 FERC P 61,211, at p. 61,612 (1993).

a protesting LDC does not constitute a bypass of the LDC.[38] Thus, the service to GPC proposed by Midwestern does not constitute a bypass of SIGECO since SIGECO is not currently providing such service to GPC. Rather, SIGECO's protest is based on the assumption that it will lose the opportunity to capture GPC's business for itself if the Commission grants Midwestern's request for a certificate. As the Commission has stated, lost opportunity is not the same as cost shifting. There are at present no LDC costs being recouped through this potential market. Since this is a new plant, SIGECO cannot claim reduced revenues or load, and neither the duplicative facilities nor cost-shifting arguments are relevant. Further, GPC will pay for the new Midwestern facilities; accordingly, no costs will be shifted to existing Midwestern shippers. What SIGECO really objects to is competition from interstate pipelines. We have consistently held, however, that the public interest is served by fostering such competition.[39]

There is no merit to SIGECO's claim that Midwestern's proposal would result in wasteful duplication of facilities. Neither SIGECO nor Midwestern has ever served GPC, and neither has existing facilities connected to GPC's new plant to do so. Further, GPC has agreed to reimburse Midwestern for the facilities' costs. Since GPC has requested service from Midwestern rather than SIGECO, only Midwestern will construct facilities and thus there will be no duplication of facilities as alleged by SIGECO.

---

38. Texas Eastern Transmission Corp., 71 FERC P 61,020, at p. 61,088 (1995); Mojave Pipeline Co., 69 FERC P 61,244, at p. 61,921 (1994).

39. 50 FERC P 61,069, at p. 61,149 (1990).

SIGECO also argues that Indiana state law prohibits wasteful duplicative utility facilities and services.[40] We have found that Midwestern's proposal falls within the Commission's exclusive jurisdiction. Thus, the cited Indiana law has no bearing on Midwestern's proposal.

SIGECO contends that GPC summarily rebuffed SIGECO's attempts to negotiate an agreement for utility services to GPC's new plant despite SIGECO's allegedly superior proposal. SIGECO states that it cannot determine from Midwestern's application whether Midwestern is the lowest cost provider. Further, SIGECO submits, Midwestern did not explain GPC's unwillingness to consider SIGECO's service as an alternative to Midwestern's. Thus, SIGECO submits, there is no evidence to support a finding that Midwestern's proposal represents the lowest-cost alternative or that there was a fair competitive process for GPC's business.

Midwestern denies that it has engaged in any anticompetitive or unduly discriminatory behavior. GPC states that, contrary to SIGECO's contentions, SIGECO's representatives met with and provided service proposals to GPC. GPC states that it considered a number of suppliers and service providers for natural gas service to its new plant, including SIGECO, Midwestern, and other interstate pipelines. After its review of the various available service options and providers, GPC determined that receiving natural gas through a direct connection to Midwestern, an open access interstate transportation provider, would be the most cost-effective and otherwise appropriate option. According

40. Citing Indiana Code Section 8-1-2-86.

to GPC, it gave fair consideration to SIGECO's proposal but simply did not determine that proposal to be its preferred alternative. GPC maintains that its ability to obtain open access transportation directly from Midwestern and the resulting natural gas cost efficiencies, were crucial factors in its decision to construct a new facility, to locate it in southern Indiana, and in the potential success of the new plant.

The Commission's current policy is to allow competition between local distribution companies and interstate pipelines where there is no indication that the end-user's choice of the pipeline's proposed service was the result of the pipeline's anti-competitive or unduly discriminatory behavior. This policy is based upon a belief that on a national level, natural gas consumers are better served by a competitive natural gas market which encourages improved services at lower costs.[41]

We note that GPC approached Midwestern and requested Midwestern to establish a delivery point to provide transportation service to GPC. Under current Commission policy, we strive to honor the decision by an end-user on whether it is economic to undertake direct service from a pipeline supplier.[42] This policy allows all participants in the natural gas market greater access to the market. The Commission has stated that it is not willing to shield

---

41. See, e.g., ANR Pipeline Company, 71 FERC P 61,289 (1995); Paiute Pipeline Company, 68 FERC P 61,199 (1994); Northern Natural Gas Company, 46 FERC P 61,270 (1989).

42. See Peoples Natural Gas Company, 59 FERC P 61,121, at p. 61,475 (1992).

local distribution companies from the effects of competitive forces, because it believes that in the final analysis, all consumers will benefit from the Commission's pro-competitive policies.[43]

GPC made its choice to solicit the services of Midwestern based upon what it perceived its best interests to be. GPC has merely exercised its right to seek competitive sourcing for gas services. It is difficult to attribute this to unfair competition on Midwestern's part. Further, Midwestern is required to honor valid requests for open access service on a nondiscriminatory basis. Midwestern's award of capacity to GPC was effectuated in full compliance with the terms of Midwestern's tariff. Under these circumstances, we find that Midwestern has not engaged in anticompetitive or unduly discriminatory behavior.

SIGECO and NIPSCO are concerned that Midwestern's proposal to construct a pipeline with 30,000 Dth/d of capacity in excess of GPC's current needs means that Midwestern may be seeking to create its own Indiana local distribution system. SIGECO submits that Midwestern must make a subsequent prior notice filing if it intends to use the proposed pipeline facilities to serve additional customers.

Although we agree that Midwestern must make subsequent prior notice filings if it intends to connect additional customers to the proposed lateral pipeline, we

---

43. ANR Pipeline Company, 71 FERC P 61,289 (1995); Paiute Pipeline Co., 68 FERC P 61,064, order deferring consideration, 69 FERC P 61,247 (1995), order on reh'g, 70 FERC P 61,227 (1995); NorthwestPipeline Corp., 54 FERC P 61,191, at p. 61,574 (1991).

disagree that Midwestern may be seeking to create a local distribution system by constructing excess capacity. Midwestern states that GPC requested it to install a pipeline capable of accommodating a transportation quantity of approximately 40,000 Dth/d, i.e., an 8-inch line, in anticipation of GPC's planned expansions of the plant. Further, sizing the line to accommodate future expansions will prevent future environmental disturbances and avoid further inconvenience to landowners. Furthermore, no costs will be shifted to existing customers as a result of construction of an 8-inch diameter lateral because GPC is fully reimbursing Midwestern for the cost of the facilities. Under these circumstances, we have no reason to object to the excess capacity Midwestern proposes to construct.

C. Request for Hearing

SIGECO requests an evidentiary hearing to address alleged disputed issues of fact including the extent of any duplication of facilities; whether GPC considered SIGECO's, or anyone's, competing proposal; whether Midwestern's agreement with GPC represents the lowest-cost alternative for GPC; a comparison of Midwestern's and SIGECO's proposals to serve GPC in terms of the construction costs, the capital and related operating expenses, the rates, terms, and conditions, and the environmental impacts. SIGECO argues that the Commission should at least require the parties to submit the underlying service agreements between Midwestern and GPC to determine whether the competitive process was fair.

Appendix B

The requirement for a trial-type evidentiary hearing applies only to disputed issues of material fact that cannot be resolved on the basis of the written record.[44] We believe that the parties had an adequate opportunity to present their views and the Commission had an adequate record upon which to base its decision. For the reasons discussed above, we find that SIGECO's protest does not raise any issues of anti-competitive or unduly discriminatory behavior on the part of Midwestern and that there are no material facts in dispute in this proceeding requiring a hearing. Rather, the evidence shows that Midwestern's proposal will provide GPC with options it desires to better serve its interests. For all the reasons provided above, we find Midwestern's proposal is required by the public convenience and necessity.

As noted above, because of the protest to Midwestern's prior notice filing, the Commission treated the filing as an application for specific Section 7(c) authorization. It is the Commission's policy not to grant Section 7(c) case-specific authority to construct and operate facilities when the applicant can do so under its blanket certificate.[45] The Commission, therefore, will authorize Midwestern to construct and operate the subject facilities under its Part 157 blanket certificate authorization.

---

44. See, e.g., Amador State Lines, Inc. v. U.S., 685 F.2d 333 (9th Cir. 1892); Boston Carrier, Inc. v. ICC, 728 F.2d 1508 at 1511 n.5 (D.C. Cir. 1984).

45. See Gas Transport, Inc., 50 FERC P 62,013 (1990); Tennessee Gas Pipeline Co., 55 FERC P 61,437 (1991).

Appendix B

IV. Environmental Analysis

On October 9, 1998, after reviewing Midwestern's prior notice application and the environmental comments by SIGECO in this docket, the Commission's staff issued a Notice of Intent to Prepare an Environmental Assessment For The Proposed GPC Sales Tap Project and Request For Comments on Environmental Issues (NOI). Five parties responded with comments regarding the NOI: SIGECO, the U.S. Fish and Wildlife Service (FWS), the Federal Aviation Administration, GPC, and Midwestern. These comments are addressed in the Environmental Assessment (EA) prepared by the Commission's staff. The EA recommends several mitigation measures, which we adopt and upon which this order's authorization is conditioned.

As discussed, Midwestern's proposed facilities will be used to provide gas service to a corn processing plant under construction by GPC. Because the GPC plant is a nonjurisdictional facility and already under construction, the EA does not consider GPC's plant.

The FWS states that the bottomland forest present in Midwestern's project area includes valuable habitat for wildlife, including, potentially, the federally listed Indiana bat and the bald eagle. The FWS states that the bald eagle is not likely to occur in the project area and is therefore not of concern. Further, based on mist-net surveys conducted by Midwestern as requested by the FWS, no Indiana bats are present. Thus, the FWS has concluded, and the EA concurs, that the proposed project would not adversely affect any federally endangered or threatened species.

Appendix B

Midwestern has agreed to compensatory mitigation ratios for restoration of trees within forested habitat of present wildlife. However, long-term impact on present wildlife nevertheless would be associated with the removal of the trees; therefore, avoidance of tree clearing is preferable, where possible. The Commission's staff has determined that Midwestern could avoid clearing one acre of bottomland hardwood forest by relocating the exit point for its directional drill. Therefore, to minimize the long term effects of the proposed project, the EA recommends that Midwestern relocate the exit point for the directional drill of the West Fork White River east of milepost (MP) 1.54 to avoid the bottomland hardwood forest. In addition, the EA recommends that Midwestern not clear any trees between the east bank of the river and the exit point for the directional drill.

The EA also analyzes the alternative plan submitted by Midwestern to open-cut the West Fork White River in the event directionally drilling fails. The EA finds that the alternative plan is generally acceptable and would approve the additional work space required should Midwestern have to open cut. However, if Midwestern does has to cross the West Fork White River using the open-cut technique, the EA recommends that Midwestern:

a. limit the width of the construction right-of-way, not including extra work spaces, to 50 feet through the riparian area along the east side of the river;

b. replant trees within the temporary portion of the construction right-of-way between MPs 1.45 and 1.49 according to the ratios suggested for this project by the IDNR; and

c. monitor the success of tree planting in accordance with Midwestern's Floodway Forest Mitigation Plan.

In its comments on the NOI, SIGECO raised the concern that "the Army Corps of Engineers may have improperly authorized this activity [the proposed project] under a nationwide permit." However, the U.S. Army Corps of Engineers (COE) has subsequently confirmed that Nationwide 12 permit, issued by COE to Midwestern on April 3, 1998, is appropriate for all proposed project activities, including the crossing of Patrick Ditch, the horizontal directional drilling of West Fork White River, and the alternate open-cut method of crossing the West Fork White River.

Midwestern proposes to use 100-foot-wide construction right-of-way for its pipeline, of which about half will be permanent right-of-way and half temporary construction right-of-way. Midwestern has stated that the construction work area would be reduced to the 50-foot-wide permanent right-of-way corridor through wetland areas. Extra work spaces would total about 8.4 acres. Of this 8.4 acres, 0.11 acre would be located in the riparian, bottomland hardwood forest.

In reducing the proposed 100-foot-wide construction right-of-way width to 50 feet in wetland areas, the Commission's staff has concluded that 100 feet is wider than necessary to install an 8-inch-diameter pipeline in other portions of the route. Therefore, to minimize impact on the bottomland hardwoods and upland forests, the EA recommends that Midwestern also limit the width of the construction right-of-way through all forested areas to 50 feet.

Appendix B

In its comment on the NOI, SIGECO stated that "it appears that Midwestern and the state expedited the historic preservation and archeological review process to such an extent that meaningful review was not done" and that the review "may have overlooked cultural resources." We disagree. Midwestern contacted the Indiana State Historic Preservation Office (SHPO) regarding the need for a cultural resources survey of the proposed project area. In a letter dated February 13, 1998, the SHPO indicated that most of the pipeline alignment east of the West Fork White River had been previously evaluated, and that based on the results of a previous investigation, only that portion of the project west of the river would require a survey.

Midwestern completed a cultural resources survey (west of the West Fork White River) which covered a 150-foot-wide corridor, extra work spaces and pipeyards. Two prehistoric sites and two historic sites were identified as a result of the survey. None of these sites were recommended as eligible for the National Register of Historic Places (NRHP). No evidence of any previously recorded sites was identified. Subsequently, Midwestern contacted the SHPO (letter dated March 26, 1998) identifying additional access roads, a pipeyard, and access/ turning areas on the east side of the river. In a letter dated April 24, 1998, addressing both these additional areas and the cultural resources survey report, the SHPO indicated that "the proposed improvements to eastern access roads should have no effect on significant archaeological resources, as long as all construction is limited to previously disturbed areas" and that no further investigation of the eastern pipeyard was warranted. The SHPO also concurred that the four

archaeological sites were not likely to yield significant information, and no further investigation of the sites appeared to be warranted.[46]

In further comments, SIGECO provided a brief records and literature review of the "vicinity of Maysville" to evidence that the area has a high potential for historic and prehistoric resources. This potential already been identified by the SHPO and was the basis for the SHPO's conducting a survey of the previously unsurveyed portions of the proposed project. The survey report includes a literature review and records search of the area within a three-mile radius of the proposed project. The documented historical and archaeological importance of the area notwithstanding, the on-the-ground survey identified no NRHP-eligible cultural resources. The Commission's staff has reviewed and concurs in the results of the SHPO's cultural resources survey report. Thus, we find SIGECO's concerns unfounded and its allegations unsubstantiated.

The no-action alternative would preclude Midwestern from providing the proposed service to GPC. GPC would then be forced to make alternative arrangements for natural gas or to use other energy sources, such as fuel oil or coal. Therefore, while denial of Midwestern's application would avoid the environmental impact identified in the EA, the use

---

46. The surveying and testing of the portion of the project east of the West Fork White River is documented in a report meeting the Secretary of the Interior's Standards and Guidelines for the currently proposed project. The report has been reviewed by the SHPO and the Commission's staff in accordance with Section 106 of the National Historic Preservation Act.

of fuels other than natural gas could result in more diverse impacts, particularly on air quality.

The no-action alternative also would cause a delay in Midwestern's ability to provide gas service would affect GPC's plans to test its plant equipment, currently under construction, in April 1999.

Aside from the no-action alternative, SIGECO stated that it could provide natural gas service to GPC with fewer facilities and less environmental impact than Midwestern's proposal. SIGECO's franchise area. However, it is not clear whether SIGECO could construct the necessary facilities in the time frame required by GPC. Further, it is not known whether SIGECO's facilities could provide GPC with the same levels of service proposed by Midwestern (i.e., up to 10,000 dekatherms of gas per day for plant start-up, with expansion up to 40,000 dekatherms per day). Moreover, as discussed above, GPC states that it considered and rejected SIGECO as a gas supplier. GPC further stated that its ability to obtain open access transportation directly from Midwestern and the resulting natural gas cost efficiencies were crucial factors in its decision to construct the plant.

Therefore, while the EA concludes that SIGECO's alternative may be environmentally preferable to Midwestern's proposal based solely on environmental grounds, it is not likely that SIGECO could meet the time frames required by GPC. Further, the Commission's policy of promoting competition, as discussed above, makes SIGECO's proposed alternative less desirable.

Appendix B

With adoption of the above-discussed recommendations and implementation of the mitigation measures set forth in the appendix to this order, the EA concludes that Midwestern's project would not constitute a major Federal action significantly affecting the quality of the human environment.

V. Conclusion

At the hearing held on December 16, 1998, the Commission on its own motion received and made a part of the record in this proceeding, all evidence, including the applications and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record,

The Commission orders:

(A) Midwestern is authorized to construct and operate the proposed facilities under its Part 157 blanket certificate, all as more fully set forth in this order, subject to the conditions set forth herein and in the appendix to this order.

(B) SIGECO's and NIPSCO's protests, and SIGECO's request for a hearing, are denied.

(C) Midwestern shall notify the Commission's environmental staff by telephone and/or facsimile of any environmental noncompliance identified by other Federal, state, or local agencies on the same day that such agency notifies Midwestern. Midwestern shall file a written confirmation of such notification with the Secretary of the Commission within 24 hours.

Appendix B

Appendix

Environmental Mitigation Conditions

1. Midwestern shall follow the construction procedures and mitigation measures described in its application and identified in the environmental assessment (EA), unless modified by this Order. Midwestern must:

a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);

b. justify each modification relative to site-specific conditions;

c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and

d. receive approval in writing from the Director of the Office of Pipeline Regulation (OPR) before using that modification.

2. The Director of OPR has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:

a. the modification of conditions of this Order; and

b. the design and implementation of any additional measures deemed necessary (including stop work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.

3. Prior to any construction, Midwestern shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors, and contractor personnel will be informed of the environmental inspector's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs before becoming involved with construction and restoration activities.

4. Midwestern shall relocate the exit point for the directional drill of the West Fork White River east of milepost (MP) 1.54 to avoid the bottomland hardwood forest. In addition, Midwestern shall not clear any trees between the east bank of the river and the exit point for the directional drill.

5. If Midwestern has to cross the West Fork White River using the open-cut technique Midwestern shall:

a. limit the width of the construction right-of-way, not including extra work spaces, to 50 feet through the riparian area along the east side of the river;

Appendix B

b. replant trees within the temporary portion of the construction right-of-way between MPs 1.45 and 1.49 according to ratios suggested for this project by the Indiana Department of Natural Resources;

c. monitor the success of tree planting in accordance with Midwestern's Floodway Forest Mitigation Plan.

6. Midwestern shall limit the width of the construction right-of-way through all forested areas to 50 feet.

Federal Energy Regulatory Commission

85 FERC P 61,358, 1998 WL 878038 (F.E.R.C.)

APPENDIX C — ORDER ON MOTION TO DISMISS OF THE STATE OF INDIANA, INDIANA UTILITY REGULATORY COMMISSION DATED JANUARY 27, 1999

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

CAUSE NO. 41197

IN THE MATTER OF THE PETITION BY SOUTHERN INDIANA GAS AND ELECTRIC COMPANY FOR THE INDIANA UTILITY REGULATORY COMMISSION TO ORDER MIDWESTERN GAS TRANSMISSION COMPANY TO CEASE AND DESIST FROM ENGAGING IN THE RENDERING OF GAS DISTRIBUTION SERVICE IN RURAL AREAS OF INDIANA, INCLUDING THE TRANSPORTATION OF GAS FROM OUTSIDE INDIANA FOR DIRECT SALE OR DELIVERY TO CONSUMERS WITHIN THE STATE OF INDIANA

RESPONDENT: MIDWESTERN GAS TRANSMISSION COMPANY

ORDER ON MOTION TO DISMISS

APPROVED: JANUARY 27, 1999

BY THE COMMISSION:
Camie Swanson-Hull, Commissioner
Scott R. Jones, Assistant Chief Administrative Law Judge

Appendix C

On June 11, 1998, Southern Indiana Gas and Electric Company ("Petitioner" or "SIGECO") filed its Complaint in the above-captioned matter against Midwestern Gas Transmission Company ("Respondent" or "Midwestern"). On June 18, 1998, Indiana Gas Company, Inc. filed its "Petition to Intervene of Indiana Gas Company, Inc." which appears in the following words and figures, to-wit:

(H.I.)

On June 23, 1998, Respondent filed its "Motion for Extension of Time" which appears in the following words and figures, to-wit:

(H.I.)

Said Motion was granted by docket entry dated July 16, 1998. On June 26, 1998, Northern Indiana Public Service Company filed its "Petition of Northern Indiana Public Service Company to Intervene" which appears in the following words and figures, to-wit:

(H.I.)

On July 20, 1998, Respondent filed its "Motion to Dismiss Petition, Or Alternatively for Stay and Certification to the Court of Appeals" which appears in the following words and figures, to-wit:

(H.I.)

Also on July 20, 1998, Respondent filed its "Memorandum in Support of Motion to Dismiss Petition, or Alternatively

for Stay and Certification to the Court of Appeals" which appears in the following words and figures, to-wit:

(H.I.)

On July 27, 1998, the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Gas and Coke Utility ("Citizens Gas") filed its "Petition to Intervene of Citizens Gas and Coke Utility" which appears in the following words and figures, to-wit:

(H.I.)

On August 18, 1998, the Petitioner filed its "Response of Southern Indiana Gas and Electric Company to Motion of Midwestern Gas Transmission Company to Dismiss Petition, or Alternatively, for a Stay and Certification to the Court of Appeals" which appears in the following words and figures, to-wit:

(H.I.)

On August 25, 1998, Indiana Gas Company, Inc. and Citizens Gas and Coke Utility filed their "Joint Response of Intervenors Indiana Gas Company, Inc., Citizens Gas and Coke Utility and Northern Indiana Public Service Company in Opposition to Midwestern Gas Transmission Company's Motion to Dismiss" which appears in the following words and figures, to-wit:

Appendix C

(H.I.)

On September 2, 1998, Respondent filed its "Motion for Leave to File a Reply" which appears in the following words and figures, to-wit:

(H.I.)

Also on September 2, 1998, Respondent filed its "Reply of Midwestern Gas Transmission Company to Response of Southern Indiana Gas and Electric Company" which appears in the following words and figures, to-wit:

(H.I.)

On September 8, 1998, Community Natural Gas Company, Inc. filed its "Community Natural Gas Company, Inc.'s Petition to Intervene" which appears in the following words and figures, to-wit:

(H.I.)

On September 23, 1998, Grain Processing Corporation filed its "Verified Petition of Grain Processing Corporation to Intervene" which appears in the following words and figures, to-wit:

(H.I.)

Also on September 23, 1998, Grain Processing Corporation filed its "Statement in Support of Midwestern Gas Transmission Company" which appears in the following words and figures, to-wit:

Appendix C

(H.I.)

On September 28, 1998, the Petitioner filed its "Motion of Southern Gas and Electric Company for Leave to File its Response to the Reply of Midwestern Gas Transmission Company and Grain Processing Corporation's Statement in Support of Midwestern" which appears in the following words and figures, to-wit:

(H.I.)

Also on September 28, 1998, the Petitioner filed its "Response of Southern Indiana Gas and Electric Company to the Reply of Midwestern Gas Transmission Company and Statement in Support of Grain Processing Corporation" which appears in the following words and figures, to-wit:

(H.I.)

On October 14, 1998, Community Natural Gas Company, Inc. filed its "Community Natural Gas Company, Inc.'s Statement in Support of Southern Indiana Gas and Electric Company, Indiana Gas Company, Inc., Citizens Gas and Coke Utility, and Northern Indiana Public Service Company" which appears in the following words and figures, to-wit:

(H.I.)

On December 22, 1998, Midwestern filed its "Midwestern Gas Transmission Company's Second Motion to Dismiss Based on FERC Decision" which appears in the following words and figures, to-wit:

Appendix C

(H.I.)

On December 30, 1998, Grain Processing Corporation filed its "Request of Grain Processing Corporation for Ruling on Motion to Dismiss" which appears in the following words and figures, to-wit:

(H.I.)

On January 14, 1999, Petitioner filed its "Response of Southern Indiana Gas & Electric Co. to Midwestern Transmission's Second Motion to Dismiss Based on FERC Decision in Request of Grain Processing Corporation for a ruling on that Motion" which appears in the following words and figures, to-wit:

(H.I.)

On January 14, 1999, certain of the Intervenors filed their "Intervenors Indiana Gas Company, Inc., Citizens Gas & Coke Utility and Northern Indiana Public Service Company in Opposition to Midwestern Gas Transmission Company's Second Motion to Dismiss Based on FERC Decision and a Request of Grain Processing Corporation for a Ruling on Motion to Dismiss" which appears in the following words and figures, to-wit:

(H.I.)

The Commission based upon the above-described filings and the applicable law, now finds as follows:

Appendix C

1. **Pending Motions and Petitions.** The Commission finds that the Respondent's Motion for Leave to File a Reply filed on September 2, 1998 should be granted. The Motion of Petitioner filed on September 28, 1998 for Leave to File its Response to the Reply of Midwestern Gas Transmission Company and Grain Processing Corporation's Statement in Support of Midwestern should also be granted.

The petitions to Intervene of Indiana Gas Company, Inc., Northern Indiana Public Service Company, Citizens Gas, Community Natural Gas Company, Inc., and Grain Processing Corporation should all be granted. The Respondent's request to take administrative notice of the Federal Energy Regulatory Commission's decision issued December 16, 1998 in Docket No. CP98-S38-000 should be granted.

2. **Background.** The Petitioner is a corporation, organized and existing under the laws of the State of Indiana and is engaged as a public utility in the rendering of gas utility service to the public in Indiana, including Daviess County. The Respondent is a natural gas company under the federal Natural Gas Act ("NGA") engaged in the transportation of natural gas in interstate commerce and in the construction of facilities for the transportation of gas. The Intervenor Grain Processing Corporation ("GPC") is a manufacturer and marketer of various corn-based products and is constructing a new corn processing plant in Daviess County, Indiana, which it intends to make fully operational during the summer of 1999.

According to the facts agreed upon by the parties, GPC requested service from the Respondent who filed a prior noticed request with the Federal Energy Regulatory Commission.

The service which the Respondent would provide GPC would be the interstate transportation of gas which GPC would purchase itself outside of the State of Indiana. The FERC docketed the Respondent's request as Docket No. CP98-538-000 on May 12, 1998. The Respondent's request before the FERC was for authorization to construct and operate a delivery tap, a delivery lateral, and a meter station, which facilities would be used to transport and deliver gas to a new customer, GPC, as an industrial end-user. In addition to the Complaint that the Petitioner filed initiating this proceeding, Petitioner, SIGECO, filed with the FERC a request for an evidentiary hearing within the 45-day notice period provided by the prior notice procedures of that federal agency. Additionally, NIPSCO and SIGECO filed protests to Midwestern's proposal before the FERC.

3. **SIGECO's Petition.** The thrust of SIGECO's Petition before this Commission is that the Respondent threatens to render gas distribution service in rural areas of Indiana without having obtained from the Commission a necessity certificate authorizing it to do so. The Petition states that the rendering of gas distribution service by the Respondent without such a certificate would be unlawful, unreasonable, and in violation of I.C. 8-1-2-87 (b). Further, the Petition states that I.C. 8-1-2-87.5 requires that any entity "engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within the state" must have a necessity certificate from the Commission to do so. (Petition at page 2) The Petition requests that the Commission investigate this matter and find the Respondent to be in violation of I.C. 8-1-2-87 (b) and/or I.C. 8-1-2-87.5 and order the Respondent to cease

and desist the rendering of gas distribution service in rural areas of the State of Indiana, including the transportation of gas from outside Indiana for direct sale or delivery to any consumer within the State.

4. **Respondent's Motion to Dismiss.** In its Motion to Dismiss, the Respondent Midwestern argues that the transportation of natural gas for GPC in interstate commerce by Midwestern is subject to the exclusive jurisdiction of the FERC under the NGA. 15 U.S.C. Section 717 (b). The Respondent also asserts that because it will be serving a customer and facility new to the service area, no issues of by-pass are present. Thus, any action by this Commission to assert authority over Midwestern's transportation service to GPC for gas which GPC purchases outside Indiana is preempted by the NGA. In support of its arguments, the Respondent cites five decisions from federal courts of appeals that have upheld the FERC's exclusive jurisdiction to regulate the interstate transportation of natural gas, including the interstate transportation of natural gas directly to end users, and rejecting state attempts to regulate such transactions. *See Cascade Natural Gas Corp., supra,* (10th Cir.) 955 F.2d at 1412-1419; *Public Utilities Comm. of California, supra,* (D.C. Cir.) 900 F.2d at 274-276; *National Fuel Gas Supply Corp. v. Public Service Commission of N.Y.*, 894 F.2d 571, 579 (2nd Cir.), cert. Denied, 110 S.Ct. 3240 (1990); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipeline Co.*, 689 F.Supp, 729, 732-738 (W.D. Mich. 1988), affd., 887 F.2d 1295, 1300-1301 (6th Cir. 1989), cert. Denied, 110 S.Ct. 1806 (1990) (Related case at *Michigan Consolidated Gas Co. v. F.E.R.C.*, 883 F.2d 117, 121-122 (D.C. Cir. 1989), *cert. Denied*, 110 S.Ct. 1807 (1990)); *Public Service Comm. of W. Va. V. F.P.C.*, 437 F.2d 1234, 1283-1239 (4th Cir. 1971).

Appendix C

In its Memorandum in support of its Motion to Dismiss, the Respondent states that the FERC has addressed the nature of its jurisdiction over interstate facilities in Indiana, in circumstances similar to those in the instant Petition. In *Panhandle Eastern Pipeline Co.*, Docket No. CP93-116-000, August 5, 1993, 64 FERC P61, 211, the interstate pipeline requested authorization under 18 C.F.R. §§157.205 and 157.212 to construct facilities to provide firm transportation service to a customer of a local distribution company. Both the Office of the Utility Consumer Counselor and the LDC filed Motions to Intervene and protested Midwestern's Application before the FERC. The LDC argued that the pipeline transportation service would result in a wasteful duplication of facilities and cost shifting among the LDC's customers. The LDC also contended that the customer might be a public utility subject to the IURC's jurisdiction under I.C. 8-1-2-87.5. Another Intervenor before the FERC in the Panhandle Eastern proceeding argued that the interstate pipeline proposal should also be approved by the IURC, as well as by the FERC. The FERC concluded that "it is clear that Panhandle's proposal involves the transportation of natural gas in interstate commerce over which the Commission (FERC) has exclusive jurisdiction" (citation omitted). Thus, Midwestern argues in the instant cause, Indiana has no jurisdiction in this matter and a state certificate is not required. Alternatively, the Respondent argues that this Commission should stay any further proceedings until the FERC has issued its decision and order in Docket No. CP98-538-000 and should certify the purely legal question raised to the Indiana Court of Appeals for decision and determination, pursuant to I.C. 8-1-3-10.

5. **Responsive Arguments.** SIGECO and the similarly interested Intervenors supporting SIGECO's position replied to Midwestern's arguments with the position that the five federal circuit court decisions did not sufficiently support Midwestern's position that interstate transportation is the same as local distribution of gas. They also argue that, because the federal decisions cited by the Respondents are from circuits other than the Seventh Circuit they are not controlling authority for the purpose of adjudicating SIGECO's instant petition. Further, they argue that local distribution occurs when gas is supplied to an end user and that state certification is required for that service even when the gas was purchased outside of the state of delivery. To the extent a conflict exists between federal and state statutes, SIGECO and the Intervenors argue that the Commission is bound to support and enforce the Indiana statutes leaving questions of constitutional law to other forums. SIGECO and the similarly interested Intervenors are also opposed to the certification of the legal question to the Indiana Court of Appeals, arguing that the matter would most conveniently be resolved by the IURC.

6. **Respondent's Second Motion to Dismiss.** On December 22, 1998, Midwestern renewed its Motion to Dismiss based upon a FERC decision issued in Docket No. CP98-538-000 on December 16, 1998 authorizing Midwestern to construct and operate facilities to transport natural gas for GPC. The Second Motion to Dismiss also requested that the Commission take administrative notice of the FERC's decision, which is appended to the Motion and which we have previously found should be granted. In its December 16, 1998 Order, the FERC held that it has exclusive

jurisdiction over Midwestern's proposed service to GPC, and that the service constitutes interstate transmission of natural gas, and not local distribution. (FERC Order at pages 5-8) The FERC also held that the proposed service to GPC involves no interstate retail sale which may be regulated by the states, rather that the proposed pipeline will be used solely for transportation of gas in interstate commerce.

In its Second Motion, Midwestern argues that the FERC decision collaterally estops subsequent litigation over the issue because (1) the issues sought to be estopped are within the statutory jurisdiction of the FERC; (2) the FERC was acting in a judicial capacity; (3) the parties to that proceeding, and to the proceeding before the IURC have had a fair opportunity to litigate the issues before the FERC; and (4) the FERC decision is subject to judicial review. See *U.S. v. Utah Construction and Mining Co.*, 86 S.Court 1545, 1560 (1966); *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 394 (Ind. 1988). In its Second Motion, Midwestern also argues that if the IURC is not inclined to dismiss SIGECO's Petition, any proceedings in this Cause should be stayed pending the outcome of any rehearing before the FERC and/or judicial review before the United States Court of Appeals as described by Section 19 (a) and (b) of the Natural Gas Act. 15 U.S.C. Sec. 717 (r) (a) and (b). In light of the FERC Order and the exclusivity of judicial review under Section 19 of the Natural Gas Act, Midwestern withdrew its prior alternative request for certification of the legal issue by the Commission to the Indiana Court of Appeals.

7. Responses to Second Motion to Dismiss. Petitioner and certain of the similarly interested Intervenors respond to the Second Motion to Dismiss with two basic arguments. First, that whatever the FERC's Order says, the responsibility of this Commission is to enforce the Indiana statutes, and that even though the FERC Order contains a determination that it preempts the Indiana statutes, the Commission's statutory duty is to enforce, not invalidate, Indiana law. See *General Motors Corp. v. Indianapolis Power & Light Co.*, 654 N.E.2d 752, 763 (Ind.Ct. of Appeal 1995), *Sunshine Promotions Inc. v. Ridlen*, 483 N.E.2d 761, 765 (Ind.Ct. of Appeal 1985), *State ex rel. Bash v. Medical Licensing Board of Indiana*, 451 N.E.2d 691, 696 (Ind.Ct. of Appeal 1983), *Consolidated Rail Corp. v. Smith*, 664 F.Supp. 1228, 1223 (N.D.Ind. 1987). Second, SIGECO and the similarly interested Intervenors argue that the FERC Order does not collaterally estop litigation of any question before this Commission in this proceeding. In that connection, they argue that the FERC had no statutory authority to declare Indiana Code Sections 8-1-2-87 and 87.5 invalid, and thus, the issues which the Respondent seeks to estop this Commission from considering were not within the statutory jurisdiction of the FERC. SIGECO and the similarly interested Intervenors also argue that the FERC, in entering its Order, was not acting in its judicial capacity, but rather as an interested party advocating its own position. Thus, they conclude that they did not have a fair opportunity to litigate the preemption issue before the FERC. Additionally, the responsive parties argue that under Indiana law, collateral estoppel only applies where particular issues are adjudicated in one forum and are then put at issue in a subsequent suit on a different cause of action between the same parties or their privies. See *McClanahan*

v. Remington Freight Lines, Inc., 517 N.E.2d 390, 394 (Ind. 1998). The argument follows that since the instant proceeding was initiated prior to the issuance of the FERC decision collateral estoppel would not apply.

8. **Findings.** The facts in this case, for purposes of resolving the Respondent's motion to Dismiss, are not in dispute, and therefore, a hearing is not necessary prior to this Commission's rendering of findings thereon. The Petitioner is a public utility rendering the provision of gas utility service to the public in the State of Indiana including Daviess County, Indiana. Intervenor GPC is a manufacturer and marketer of various corn-based products and is constructing a new corn processing plant in Daviess County, Indiana. GPC has requested the services of the Respondent for the purposes of transportation, in interstate commerce, of natural gas which GPC intends to purchase outside of the State of Indiana and have delivered to its facility in Daviess County, Indiana. The Petitioner argues that such transportation of natural gas, even if transported in *interstate* commerce to an end-use customer within the State of Indiana, requires certification under Indiana law even if the natural gas is owned by the end-use customer prior to its transportation. The Respondent argues that such transactions fall within the NGA and thus are subject to the exclusive jurisdiction of the FERC. The Respondent has supported this position with decisions from federal circuits which have found that state assertions of jurisdiction for the purpose of requiring certification for the provision of such services are preempted by the federal statutes, and that the FERC's jurisdiction regarding such matters is exclusive. The Respondent has also provided this Commission with a 1993

Appendix C

FERC decision based upon facts similar to the instant proceeding in which the FERC found that its jurisdiction was exclusive.

The Petitioner and certain of the similarly interested Intervenors have argued that the federal authorities which the Respondent relies upon do not include Seventh Circuit decisions, and thus, this Commission is not bound by them. In assessing the arguments of the parties, we are mindful of the fact that the Seventh Circuit, by which this Commission is bound, has been silent on the issue presented in the instant proceeding. Thus, we may only consider the five federal decisions involving facts similar to those present in this proceeding which the Respondent relies upon as persuasive. The Petitioners and certain of the similarly interested Intervenors have also argued that whether or not the Indiana statute, to the extent it may conflict with the federal statute, is constitutional, unconstitutional, or otherwise preempted, is not a decision for this Commission to make, but rather, the charge to this Commission is simply to enforce the state statutes. This is a strong argument which may not be taken lightly.

The Respondent's Second Motion to Dismiss is based upon a FERC decision issued on December 16, 1998 regarding facts common to the instant proceeding as well as the proceeding before the FERC, and specifically finds that the Indiana law requirement is preempted by the federal law. The Respondent argues in its Second Motion to Dismiss that the Petitioner and the similarly interested Intervenors are collaterally estopped from challenging the preeminence of the federal statutes. The Petitioner and the similarly interested

Intervenors have responded with the argument that the FERC is without authority to make such a ruling and that this Commission does not owe the FERC's decision deference with regard to the FERC's interpretation of federal and state statutes in any event. Further, the Petitioner and the similarly interested Intervenors argue that the FERC decision does not collaterally estop the instant litigation.

We agree with the Petitioner that this Commission is just as entitled to interpret statutes as is the FERC. We further appreciate that our function as a state administrative agency is to enforce the statutes entrusted to it, rather than to find that such statutes are unconstitutional. However, the Respondent has demonstrated that states in other federal circuits have been unsuccessful in attempting to enforce state certification statutes when federal jurisdiction has been asserted exclusively. The FERC has recently removed any doubt as to whether it would assert exclusive jurisdiction over the proposed transactions as between the Intervenor GPC and the Respondent Midwestern and while the FERC is surely within its authority to assert jurisdiction over these transactions, the exclusivity of that jurisdiction is not a question for FERC alone to determine. Thus, the question as to whether the FERC's jurisdiction is preemptive as applied to the Indiana statutes certainly is a federal question currently before a federal authority. On January 15, 1999 SIGECO filed its Request for Rehearing before the FERC.

Based upon all of the above, we find that the Respondent's Second Motion to Dismiss should be denied. While the recent FERC decision makes clear its assertion of exclusive jurisdiction, the FERC is not a reviewing body of

this forum. It does appear that the weight of federal decisions would suggest that the application of the Indiana statutes to the instant petition would not survive a federal challenge. And, advancing to hearing on the instant proceeding while the preemption question remains pending before a federal forum would be contrary to principles of economy and efficiency. Because there is an underlying state interest entrusted to this agency, we will not grant the Respondent's Motion to Dismiss while the issue is pending before federal forums. In fact, were the issue of by-pass present in this proceeding, we would have more receptively considered convening an evidentiary hearing now while the preemption question progresses through federal channels. As we are in effect deferring the federal preemption issue for resolution by federal forums, we need not reach the collateral estoppel argument raised by the parties in this proceeding. For this reason, we conclude that this proceeding should be stayed pending further resolution of the federal question before proper reviewing authorities.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The Petitions to Intervene described herein are hereby granted.

2. The Respondent's Motion for Leave to file a Reply filed on September 2, 1998 is hereby granted; the Motion of Petitioner filed on September 28, 1998 for Leave to File its Response to the Reply of Midwestern Gas Transmission Company and Grain Processing Corporation's Statement in support of Midwestern is hereby also granted.

3. Midwestern Gas Transmission Company's Second Motion to Dismiss based on FERC's decision in Docket No. CP98-S38-000 is hereby denied; however, this proceeding is stayed pending further federal review, reconsideration, or appeal of that decision.

4. This order shall be effective on and after the date of its approval.

MCCARTY, KLEIN, RIPLEY, SWANSON-HULL CONCUR; ZIEGNER DISSENTS:
APPROVED: JANUARY 27, 1999

I hereby certify that the above is a true and correct copy of the Order as approved.

s/ Joseph M. Sutherland
Joseph M. Sutherland, Executive
Secretary to the Commission

Appendix C

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

CAUSE NO. 41197

IN THE MATTER OF THE PETITION BY SOUTHERN INDIANA GAS AND ELECTRIC COMPANY FOR THE INDIANA UTILITY REGULATORY COMMISSION TO ORDER MIDWESTERN GAS TRANSMISSION COMPANY TO CEASE AND DESIST FROM ENGAGING IN THE RENDERING OF GAS DISTRIBUTION SREVICE IN RURAL AREAS OF INDIANA, INCLUDING THE TRANSPORTATION OF GAS FROM OUTSIDE INDIANA FOR DIRECT SALE OR DELIVER TO CONSUMERS WITHIN THE STATE OF INDIANA

RESPONDENT: MIDWESTERN GAS TRANSMISSION COMPANY

DISSENT OF
Commissioner David E. Ziegner

I respectfully dissent from the majority opinion in this Cause. I agree with the majority statements that the Commission's ". . . function as a state administrative agency is to enforce the statutes entrusted to it. . . ." I also agree with the majority that Respondent's Second Motion to Dismiss should be denied. However, I do not believe that a stay is the appropriate action for the Commission since I believe our state statute is still in effect. I would prefer to rule on the merits of the case.

s/ Commissioner David E. Ziegner
Commissioner David E. Ziegner

APPENDIX D — REQUEST OF THE MIDWESTERN GAS TRANSMISSION COMPANY FOR BLANKET AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwestern Gas Transmission Company
Docket No. CP00- -000

REQUEST UNDER BLANKET CERTIFICATE PRIOR NOTICE PROCEDURE

Pursuant to Sections 157.205 and 157.211 of the Regulations of the Federal Energy Regulatory Commission ("Commission") and blanket authority granted in Docket No. CP82-414-000 on September 1, 1982, Midwestern Gas Transmission Company ("Midwestern") hereby provides prior notice that it intends to construct and operate a delivery tap under its blanket authority to facilitate deliveries of natural gas to Scepter, Inc. ("Scepter"), an industrial end-user. In support hereof, Midwestern states as follows:

I.

IDENTITY OF APPLICANT

The exact legal name of Midwestern is Midwestern Gas Transmission. Midwestern is a corporation organized and existing under the laws of the State of Delaware. The location of Midwestern's principal place of business is located at 1001 Louisiana Street, Houston, Texas 77002. The names, titles,

mailing addresses and telephone and facsimile numbers of the persons designated to receive service and to whom communications concerning this application are to be addressed are as follows:

*David E. Maranville,
Counsel
Midwestern Gas Transmission
Company
P.O. Box 2511
Houston, Texas 77252
(713) 420-3525
(713) 420-7025 (Fax)

*Anthony Ivancovich
Andrews & Kurth, L.L.P.
1701 Pennsylvania
Avenue, N.W.
Suite 300
Washington, D.C. 20006
(202) 662-2700

Thomas G. Joyce,
Manager of Certificates
*Veronica Hill, Certificates &
Regulatory Compliance
P. O. Box 2511
Houston, Texas 77252-2511
(713) 420-3555
(713) 420-5608 (Fax)

*Michael D. Moore
Director, Federal Agency
Affairs
El Paso Energy Corporation
601 13th Street, N.W.,
Suite 850 South
Washington, D.C. 20005
(202) 662-4300
(202) 662-4315 (Fax)

(*Persons designated for service in accordance with Rule 203, 18 C.F.R. § 385.203, of the Commission's Rules of Practice and Procedure.) Midwestern requests that the Commission waive Rule 203(b)(3) to allow designated service to four persons.)

Appendix D

II.

PROPOSED OPERATIONS

Midwestern proposes to install a tap on its system located at approximately Milepost 2111-1+17.5 in Knox County, Indiana. Scepter requested the new delivery point to serve its industrial plant. More specifically, Midwestern will install, own and operate a 2-inch hot tap, check valve and electronic gas measurement (EGM) including communication equipment. Scepter will install, own, operate and maintain approximately 200 feet of 2-inch interconnect pipe. Scepter will also install, own and maintain measurement facilities. Midwestern will operate the measurement equipment. Scepter will reimburse Midwestern for the estimated cost of the tap facilities, $32,300.

Upon completion of the facilities to serve Scepter, Midwestern will transport up to 862 dekatherms per day of natural gas on an interruptible basis pursuant to the terms of Midwestern's Rate Schedule IT. Such services will be provided pursuant to Midwestern's blanket transportation certificate and will therefore be within the certificated entitlements of Scepter at this location.[1]

Pursuant to § 157.211(a)(2) of the Commission's regulations, Midwestern notes that Southern Indiana Gas and Electric Company ("SIGECO"), a local distribution company ("LDC"), currently provides natural gas service to the Scepter industrial plant. Additionally, Midwestern

1. Midwestern Gas Transmission Company, 50 FERC ¶ 61,227 (1990), Docket No. CP90-174.

will comply with § 284.223(b) by providing, prior to commencement of natural gas service, written notice to SIGECO and its regulatory agency.

III.

ENVIRONMENTAL MATTERS

Midwestern submits herewith the environmental clearance letters received from the following agencies: U.S. Fish and Wildlife Service and the Indiana Department of Natural Resources. These letters are included as Attachment A. Attachment B contains a map and schematic showing the location of the proposed project. This project is located in an agricultural field.

V.

IMPACT ON PEAK DAY DELIVERIES

The installation of this delivery point will not have a significant impact on Midwestern's annual deliveries or peak day operations because the proposed service is interruptible.

VI.

MISCELLANEOUS

Midwestern will provide written notification to the Commission within thirty days of the commencement of this service. Midwestern will install and operate the proposed facilities in compliance with 18 C.F.R. Part 157, Subpart F.

Further, Midwestern has sufficient capacity to render the proposed service without detriment or disadvantage to its other existing customers and its tariff does not prohibit the proposed installation of facilities. Midwestern knows of no other applications, which are related to the instant filing.

VII.

FORM OF NOTICE

A notice suitable for publication in the Federal Register is included herewith and incorporated herein by reference.

VIII.

CONCLUSION

WHEREFORE, Midwestern requests that the Commission, after giving public notice of this filing, allow Midwestern to construct these facilities as proposed herein in order to provide transportation service to Scepter as described above.

Respectfully submitted,

MIDWESTERN GAS
TRANSMISSION COMPANY

By s/ David E. Maranville
David E. Maranville, Counsel

APPENDIX E — AFFIDAVIT OF MIKE A. STOKDYK DATED APRIL 26, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 00-0592-C-H/G

MIDWESTERN GAS TRANSMISSION COMPANY, a Delaware corporation,

Plaintiff,

vs

INDIANA UTILITY REGULATORY COMMISSION and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, an Indiana corporation,

Defendants.

AFFIDAVIT OF MIKE A. STOKDYK

Mike A. Stokdyk, being first duly sworn, states:

1. I am employed by El Paso Energy Company, which owns one hundred percent of plaintiff Midwestern Gas Transmission Company, as its Manager of Business Development. In this capacity, my responsibilities include attracting and making commercial arrangements for new transportation customers to Midwestern's system. I have held this position since 1995. Prior to that time, my responsibilities included work in field operations, engineering, operations

and facility planning, strategic planning and international operations. In all, I have over sixteen years of experience in the natural gas pipeline industry. As a result of my work, I have personal knowledge of the matters set forth in this Affidavit and if called would so testify.

2. Plaintiff Midwestern owns and operates an interstate natural gas pipeline engaged in the interstate transportation of natural gas. Midwestern's pipeline runs through four States with terminal points in Tennessee and Illinois.

3. Exhibit A to this Affidavit is a true copy of a Firm Gas Transportation Agreement by and between Midwestern and Grain Processing Corporation (GPC) dated December 4, 1997. As described in that contract, the business arrangement between Midwestern and GPC involves GPC's use of Midwestern's interstate pipeline to transport the gas to GPC's, adjacent Indiana facility. The Midwestern-GPC transaction involves no sale of gas by Midwestern to GPC. Rather, GPC utilizes Midwestern's interstate pipeline system exclusively for interstate transportation of has purchased by GPC outside of Indiana from third parties.

4. Exhibit B to this Affidavit is a true copy of a Firm Gas Transportation Agreement by and between Midwestern and Scepter, Inc. dated March 1, 2000. The Midwestern-Scepter contract likewise concerns the construction and operation of interstate pipeline and related facilities to connect Scepter's Indiana facility to Midwestern's adjacent interstate natural gas pipeline. As with GPC, the parties' business arrangement involves no sale of gas by Midwestern to Scepter. Rather, Scepter is purchasing gas outside of

Indiana from third parties and then utilizing Midwestern's interstate services solely to transport the gas to Scepter's Indiana facility.

5. Exhibit C to this Affidavit is a true copy of Midwestern's application to the Federal Energy Regulatory Commission in Docket No. CP00-5-000 for authorization to proceed with the construction and operation of facilities to provide interstate natural gas transportation service to Scepter.

6. Exhibits D-1 and D-2 to this Affidavit are true copies of petitions filed by Southern Indiana Gas and Electric Company before the Indiana Utility Regulatory Commission in Cause Nos. 41632 and 41633.

7. On the basis of my over sixteen years of experience in the natural gas industry as described in paragraph 1 above, it is my opinion that should the Indiana Utility Regulatory Commission order Midwestern to cease providing interstate transportation service to its customers, GPC and Scepter, that one result of such an order would be the further disruption of Midwestern's business arrangements with these parties and, potentially, a consequent loss of commercial goodwill. While such a loss of commercial goodwill is intangible and cannot easily be translated into dollar terms, it is, potentially, a serious form of harm to Midwestern's business interests.

8. The foregoing statements are true to the best of my knowledge and belief.

s/ Mike A. Stokdyk
Mike A. Stokdyk